COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 22-23, 2006
Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 22-23, 2006

VOLUME I

1. Opening Remarks of the Chair

   A. Report on the March 2006 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2006 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center (Oral report)

5. Report of the Technology Subcommittee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed uniform rules' amendments governing privacy and security concerns arising from electronic filings with the court in accordance with the E-Government Act of 2002
   B. Text of amendments to Appellate, Bankruptcy, Civil, and Criminal Rules implementing E-Government Act

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule 25(a)(5) implementing E-Government Act
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 29 and 41
   C. Minutes and other informational items

8. Report of the Evidence Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed new Rule 502
   B. Minutes and other informational items

9. Time-Computation Subcommittee Report

10. Long-Range Planning Report

VOLUME II

11. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1014, 3007, 4001, 6006, and 7007.1, and proposed new Rules 6003, 9005.1, and 9037
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011
   C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Interim Rule 1007
   D. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1
   E. **ACTION** – Approving publishing for public comment proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, 24, new Exhibit D to Official Forms 1, 25A, 25B, and 26
   F. Minutes and other informational items

VOLUME III

12. Report of the Civil Rules Committee

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed new Rule 5.2
   B. **ACTION** — Approving and transmitting to the Judicial Conference proposed restyled Rules 1-86
   C. **ACTION** — Approving and transmitting to the Judicial Conference proposed style/substance amendments to Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78

D. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes of Civil Forms

E. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes to the electronic discovery amendments involving Rules 16, 26, 33, 34, 37, and 45

F. **ACTION** – Approving publishing for public comment proposed amendments to Rules 6, 13, 15, and 48, and proposed new Rule 62.1

G. Minutes and other informational items

13. Next Meeting: January

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May 31, 2006
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Judge Irene M. Keeley
Judge Christopher M. Klein
J. Michael Lamberth, Esquire

Subcommittee on Technology and Cross Border Insolvency
Judge Mark B. McFeeley, Chair
Judge R. Guy Cole, Jr.
Judge Irene M. Keeley
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire

Subcommittee on Venue
K. John Shaffer, Esquire, Chair
Judge R. Guy Cole, Jr.
Judge Christopher M. Klein
Judge Eugene R. Wedoff

CM/ECF Working Group
Judge Mark McFeeley

May 31, 2006
Projects

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Rule 15
Judge Michael M. Baylson, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Robert C. Heim, Esquire
Frank Cicero, Jr., Esquire

Subcommittee on Rules 26(a) and 30(b)(6)
Judge David G. Campbell, Chair
Chilton Davis Varner, Esquire
Daniel C. Girard, Esquire
Professor Richard L. Marcus, Special Reporter

Subcommittee on Style
Subcommittee A
Judge Thomas B. Russell, Chair
Judge David G. Campbell
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Frank Cicero, Jr., Esquire
Honorable Peter D. Keisler
Professor Thomas D. Rowe, Jr., Consultant

Subcommittee B
Judge Paul J. Kelly, Jr., Chair
Judge Jose A. Cabranes
Judge Michael M. Baylson
Justice Nathan L. Hecht
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler
Professor Richard L. Marcus, Special Reporter

Subcommittee on Time Counting
Subcommittee A
Judge David G. Campbell, Chair
Judge C. Christopher Hagy
Professor Steven S. Gensler
Daniel C. Girard, Esquire
Frank Cicero, Jr., Esquire
Honorable Peter D. Keisler

Subcommittee B
Judge Michael M. Baylson, Chair
Judge Jose A. Cabranes
Justice Nathan L. Hecht
Chilton Davis Varner, Esquire
Robert C. Heim, Esquire
Honorable Peter D. Keisler

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Blakely
(Open) Chair
Judge David G. Trager
Judge Anthony J. Battaglia
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
(Open)
DOJ representative

Subcommittee on Grand Jury
(Open), Chair
(Open)
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
DOJ representative

Subcommittee on Preliminary Proceedings
Judge Anthony J. Battaglia, Chair
(Open)
DOJ representative

Subcommittee on Rule 16/Brady
Donald J. Goldberg, Chair
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Thomas P. McNamara
DOJ representative

Subcommittee on Rule 29
Judge David G. Trager
Professor Nancy J. King
DOJ representative

Subcommittee on Rule 32.2
Judge Mark L. Wolf, Chair
Judge James P. Jones
Professor Nancy J. King
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 37
Professor Nancy J. King, Chair
Thomas P. McNamara
DOJ Representative

Subcommittee on Rule 41
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
(Open)
DOJ representative

Subcommittee on Victims Rights Act
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ representative

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

May 31, 2006
Projects

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April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25 and a new Rule 32.1.

[See infra., pp. __ __ __.]

2. That the foregoing amendment and new rule shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1009, 5005, and 7004.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2006, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the reports of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 5, 9, 14, 16, 24, 26, 33, 34, 37, 45, 50, and 65.1; Form 35; and new Rule 5.1.

2. That the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions be, and they hereby are, amended by including therein the amendments to Rules A, C, and E, and new Rule G.

[See infra., pp. ___ ___ ___.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58.

[See infra., pp. __ __ __.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 404, 408, 606, and 609.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Associate Attorney General Robert D. McCallum, Jr.
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, senior attorney in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, was unable to attend in person, but he participated by telephone in the bankruptcy portion of the meeting.

In addition to Associate Attorney General McCallum, the Department of Justice was represented at the meeting by Benton J. Campbell, Counselor to the Assistant Attorney General for the Criminal Division. Alan Dorhoffer attended on behalf of the U.S. Sentencing Commission.

At the committee's request, Professor Alan N. Resnick, Donald B. Ayer, and James C. Duff made presentations to the committee.

INTRODUCTORY REMARKS

Judge Levi reported that he and Professor Coquillette had met with the new Chief Justice. He said that John Roberts will be an excellent Chief Justice and a very good friend to the rules process. He noted that the Chief Justice had served on the Advisory Committee on Appellate Rules for five years, and he would have become the new chair of that committee on October 1, 2005, but for his appointment to the Supreme Court. The committee conveyed its congratulations to Chief Justice Roberts and wished him great success in his new endeavor.

Judge Levi added that Judge Samuel Alito, chair of the Advisory Committee on Appellate Rules until October 1, 2005, had also been nominated to the Supreme Court. The committee congratulated Judge Alito on his selection and wished him well in his confirmation hearings and his future position on the Court.

Judge Levi noted that Professor Patrick Schiltz, reporter to the Advisory Committee on Appellate Rules, had just been nominated by the President to be a district judge for the District of Minnesota. He thanked Professor Schiltz for his excellent service and dedication as a reporter. The committee congratulated Professor Schiltz and wished him success.

Finally, Judge Levi reported that Judge Carl Stewart had been appointed by the Chief Justice as the new chair of the Advisory Committee on Appellate Rules. He emphasized that the high quality of these four appointments reflects very well on the quality of the membership of the rules committees as a whole.

Judge Levi noted that the terms of two members of the Standing Committee had expired on October 1, 2005 – Charles J. Cooper and David M. Bernick. He pointed out that neither was able to attend the meeting, but Professor Coquillette read a letter of appreciation from Mr. Cooper expressing his view that his participation in the work on the committee had been among the most rewarding service of his professional career. Judge Levi added that Mr. Bernick will attend the next committee meeting.

Judge Levi also welcomed Mr. Cox and Mr. Maledon as new members to the committee and read their impressive professional qualifications.

Judge Levi reported that the Judicial Conference at its September 2005 session had approved many rule amendments as part of its consent calendar, including some relatively controversial rules. The amendments included the package of changes to the civil rules relating to discovery of electronically stored information. They also included amendments to the evidence rules, including Rule 408 (use of admissions made in the course of settlement negotiations in a later criminal case) and Rule 609 (automatic

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal

the trial judge's granting of a judgment of acquittal. He noted that the advisory committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that legislation had passed the House of Representatives to undo the 1993 amendments to FED. R. CIV. P. 11 (sanctions), thereby requiring a court to impose sanctions for every violation of the rule. The legislation would also require a federal district court to suspend an attorney from practice in the court for a year if the attorney has violated Rule 11 three or more times.

Mr. Rabiej noted that other provisions had been added to the bill on the House floor. One would prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety.

Mr. Rabiej pointed out that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law had held an oversight hearing in July 2005 on the judiciary's implementation of the new bankruptcy legislation. He noted that Judge A. Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, had appeared on behalf of the Judicial Conference and testified as to the substantial amount of work accomplished by the rules committees, other Judicial Conference committees, and the Administrative Office. Mr. Rabiej reported that the testimony had been very impressive, and Judge Small had reassured the Congressional subcommittee that the judiciary would be able to meet all the statutory deadlines.

Mr. Rabiej said that proposed legislation to allow cameras in federal courtrooms at the discretion of the presiding judge was gathering steam. He noted that the Judicial Conference generally opposes cameras in the courtroom.

Mr. Rabiej reported that the rules office had received a request from the Foreign Intelligence Surveillance Court in October to comment on its local rules and to inquire about the rules process in general. He said that he and Professor Capra had reviewed the court's rules, and the court had accepted virtually all their suggested comments.

Judge Levi noted that the Director of the Administrative Office, Leonidas Ralph Mecham, had announced his retirement, and a search committee of judges had been appointed by the Chief Justice to assist him in recommending a replacement.

Mr. McCabe reported that the Administrative Office's rules web site had become very popular. He noted that the staff had posted all rules committee minutes and reports back to 1992, and they will soon post all the committee agenda books back to 1992. He added that all public comments are now being posted as they are received, and the rules office is attempting to locate all the key records of the rules committees – especially

minutes and reports – back to the earliest days of the rules program. These records, once posted, should be of substantial benefit to scholars, judges, and lawyers.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of various pending projects of the Federal Judicial Center, as summarized in Agenda Item 4. He directed the committee's attention to two projects involving the federal rules.

First, the Center is examining the impact of the Class Action Fairness Act of 2005 on the resources of the federal courts. The study will begin by determining whether there has been any increase in the number of class actions filed as a result of the Act. Center staff will then examine whether there have been any changes in the workload burdens of the district courts. Finally, they will also look at the burdens imposed by class actions on the courts of appeals. Mr. Cecil reported that there are serious limitations on the data available, and researchers are going through individual case records on a district-by-district basis.

Second, Mr. Cecil described the Center's project to address ongoing confusion regarding the standard of review in patent claims construction. He noted that about one-third of the patent cases are remanded to the district courts on claims construction issues. He said that a survey was being conducted of district judges and attorneys to identify case-management techniques that might improve the claims-construction process and to explore whether some increased ability for interlocutory appeals in patent cases would be helpful.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 5).

Judge Stewart reported that the advisory committee had no action items to present. He pointed out that the committee had just completed its marathon efforts to approve new Rule 32.1, governing citation of opinions. He said that the thorough work of the committee, the extent of the public comments, and the invaluable research produced for the committee by the Federal Judicial Center and the Administrative Office had shown that the Rules Enabling Act process had worked exceedingly well.

Judge Stewart noted that the advisory committee would meet next in April 2006 and would address a number of issues described in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Morris and Judge Zilly (by telephone) presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 12, 2005 (Agenda Item 6).

Professor Morris reported that the committee had met twice since the last Standing Committee meeting and had conducted numerous teleconferences in order to complete work on the package of official forms and interim rules to implement the omnibus bankruptcy legislation. He pointed out that the interim rules and the forms had been circulated to the courts in August 2005 and posted on the rules web site for public comment. The advisory committee considered the public comments and made a few essential changes in the interim rules and the forms at its September 2006 meeting. He added that every district had adopted the interim rules without change or with very minor changes.

Professor Morris said that the advisory committee will meet next in March 2006, and it plans to submit a package of permanent rule revisions for publication at the June 2006 meeting of the Standing Committee. The proposed national rules will build on the interim rules and include a number of other provisions not included in the interim rules and some amendments unrelated to the bankruptcy legislation.

Professor Morris reported that the advisory committee had also conducted a cover-to-cover study of the restyled civil rules at the request of the Advisory Committee on Civil Rules. He explained that the civil rules apply generally in adversary proceedings, and they may be applied in contested matters. In addition, some bankruptcy rules are modeled on counterpart provisions in the civil rules. He noted that the advisory committee had broken into six groups, each of which carefully reviewed an assigned block of rules, checked for any possible impact on the bankruptcy rules, and examined whether any changes were needed in language or cross-references. At the end of this detailed study, he said, the advisory committee found very few problems with the restyled civil rules, and it communicated its observations to the Advisory Committee on Civil Rules.

Judge Zilly added that the individual members of the advisory committee had spent an enormous amount of time studying the new bankruptcy legislation and drafting the interim rules. In addition, they devoted an enormous amount of time to revising the official bankruptcy forms and devising new forms to implement the new procedural

requirements of the legislation. He noted that the official forms took effect on October 17, 2005, following approval by the Executive Committee of the Judicial Conference.

Historical Perspective

At the request of Judge Levi, Professor Resnick gave the committee a historical perspective on the bankruptcy system and the Federal Rules of Bankruptcy Procedure.

He explained that the Constitution gives Congress authority to establish uniform laws on the subject of bankruptcy and to make bankruptcy exclusively federal. The first meaningful national bankruptcy law, he said, was enacted in 1898, and it lasted until 1978. The 1898 Bankruptcy Act was amended substantially in the 1930s. Enactment of Chapter 11 in 1938 marked a major move away from liquidation and towards saving businesses.

By the late 1960s, several bankruptcy experts thought that it was time to conduct a complete review of the bankruptcy system. So Congress passed a law in 1968 creating a national bankruptcy commission, comprised of members of Congress, law professors, judges, and lawyers. The commission filed a report in 1973 that recommended replacing the 1898 Act with a new substantive bankruptcy law and a revised bankruptcy court structure. From 1973 to 1978, a great deal of debate ensued over the commission's recommendations, both in Congress and in the bankruptcy community, and in 1978 Congress enacted a new Bankruptcy Code and a new Article I court structure.

New procedural rules were needed to implement the 1978 Code. But there was not sufficient time to promulgate rules under the regular Rules Enabling Act process before the provisions of the 1978 Code took effect on October 1, 1979. Therefore, the Advisory Committee on Bankruptcy Rules drafted a set of "suggested interim rules" over a period of nine months. They were circulated to the courts in October 1979, with the notation that they had not been approved either by the Standing Committee or the Judicial Conference. They were generally adopted by the courts as local rules. The advisory committee then began work on drafting the new Federal Rules of Bankruptcy Procedure, which eventually took effect in 1983.

In 1982, the Supreme Court declared the jurisdictional provisions of the 1978 law unconstitutional in *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). In 1984, new legislation was enacted that cured the jurisdictional defects and created the current bankruptcy court system under which bankruptcy jurisdiction is vested in the district courts and then delegated to the bankruptcy judges. The new court structure was reflected in a package of rule amendments that took effect in 1987. In 1986, the pilot U.S. trustee program – which took over the estate administration responsibilities in

bankruptcy cases – was made a nationwide system. The advisory committee drafted rule amendments to implement the U.S. trustee system, and they took effect in 1991.

In the early 1990s, credit and lending groups complained that the pendulum in bankruptcy had swung too far toward protecting debtors at the expense of creditors, and they initiated efforts to change the Bankruptcy Code. In 1994, Congress created another national bankruptcy review commission, which issued a comprehensive report in 1997. But the credit community was not satisfied with the recommendations, and their efforts led to the introduction of legislation in 1997 that would amend the Code substantially to better protect creditors' rights. The legislation was pending in each Congress from 1997 until April 2005, when it was enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At first, the Advisory Committee on Bankruptcy Rules did not move to draft potential rule changes to implement the pending legislation because its future was uncertain. In fact, the bill was vetoed by President Clinton. But with the election of President Bush in 2000, it appeared very likely that it would be enacted soon. So, the advisory committee, under the leadership of Judge Small, retained two additional bankruptcy law professors as consultants and began to study the legislation in depth to determine what changes would be needed in the bankruptcy rules and forms. By 2002, the committee had developed rough drafts of rules amendments.

The legislation was eventually enacted in April 2005, and it contained a general effective date of October 17, 2005. Fortunately, the six-month grace period gave the judiciary and the Department of Justice time to accomplish the many tasks required of them. The advisory committee, through concentrated efforts and starting from the 2002 drafts, was able to complete an emergency package of interim rules and revised official forms.

Professor Resnick said that the legislation was very controversial and had been opposed by the National Bankruptcy Conference, a committee of the American Bar Association, and virtually all bankruptcy judges and academics. But it was strongly supported by the credit card companies, banks, landlords, and certain other special interest groups.

In consumer cases, the legislation imposes additional restrictions on debtors, particularly Chapter 7 debtors. Among other things, they must undergo credit counseling and debtor education, and they must submit to a means test to determine whether they are presumed to be abusing the bankruptcy system. The test examines the debtor's monthly income, expenses, and discretionary income. Consumer bankruptcy lawyers, moreover, must meet new requirements and are exposed to additional liability that may lead them to raise their fees or go out of the consumer bankruptcy business.

For Chapter 11 business cases, a court's ability to extend the debtor's exclusive period to file a plan has been limited. The new law, moreover, generally makes it harder for small businesses to reorganize. It also gives landlords additional authority regarding leases.

Professor Resnick said that the legislation also contains some very good provisions, such as the new Chapter 15, dealing with cross-border insolvencies, and provisions dealing with health care, nursing homes, and patient rights. It also allows direct appeals from the bankruptcy court to the court of appeals in appropriate circumstances.

Professor Resnick pointed out that there are many technical flaws and ambiguities in the 500-page legislation, largely because it was drafted by special interest groups and lobbyists, and Congress was reluctant to make any changes. Moreover, he said that he thought it unlikely that Congress would enact technical amendments to correct the flaws in the near future.

He reported that the day after the legislation was signed, on April 21, 2005, the Advisory Committee on Bankruptcy Rules held a meeting of its subcommittee chairs and committee staff to decide on organizing its work. The committee decided at the outset that it should not wait the full three years it normally takes to complete the rules process. Rather, it had to produce forms and interim rules before the October 17, 2005 effective date of the legislation.

In Professor Resnick's view, there were three reasons for the advisory committee to act expeditiously. First, many of the existing national rules were now inconsistent with the statute. Second, rules and forms were needed quickly to implement the various new concepts and procedures contained in the law, such as the means test and Chapter 15 cross-border insolvency. Third, the new law explicitly directed the Judicial Conference to promulgate several new rules and forms.

Professor Resnick noted that the format of the interim rules drafted by the advisory committee differs from interim rules issued in the past. The committee, he said, decided to create the interim rules as amendments to the existing national rules, striking through deleted provisions and underlining new provisions. The interim local rules, therefore, will become the advisory committee's first draft of the proposed permanent amendments to the national rules.

He pointed out that the advisory committee had encountered a number of difficult problems in drafting the rules and forms. First of all, addressing some of the provisions in the legislation required a great deal of technical and specialized expertise in several different areas. Moreover, the advisory committee did not have time to benefit from public

comment. It adopted a subcommittee system, with six different subcommittees addressing different aspects of the legislation – consumer provisions, business provisions, cross-border insolvency, health care, appeals, and forms. Professor Resnick praised Judge Zilly as a truly amazing chair, delegating work to the subcommittees, but also serving as an active participant in the work of every subcommittee.

After the advisory committee had completed and published the interim rules and forms on the Internet in August 2005, it received a number of helpful public comments pointing out a few technical errors. The advisory committee quickly made the corrections at its September 2005 meeting.

Professor Resnick pointed out that the advisory committee had drafted interim rules only in those areas where it was important to have a rule in place by October 17, 2005, such as where the new statute conflicted with an existing national rule. The advisory committee, he said, had involved the U.S. trustee organization in all its deliberations and activities, and it received a good deal of help and advice from the U.S. trustees.

The advisory committee also tried to make the rules and forms as neutral as it could on substantive issues. For the most part, it tried to leave the resolution of ambiguities in the legislation up to the courts. But in several instances it had to resolve ambiguities in order to devise the rules and forms. Most importantly, he said, in his opinion, every member of the advisory committee left behind any personal views or opposition to the legislation, and everybody worked hard to implement the law faithfully. The advisory committee, moreover, tried to be as transparent as possible, posting its work product on the Internet. The entire staff of the Administrative Office was outstanding, and particular appreciation is due to Patricia Ketchum, who was the centerpiece of the committee's efforts to redraft the bankruptcy official forms.

Professor Resnick said that he believes that it is very unlikely that the advisory committee will consider making any additional changes in the interim rules. Instead, it will concentrate on drafting the permanent amendments to the national rules. In the process, it will look at the actual experiences of the courts in using the interim rules, review all the public comments, and add some additional rules and forms at its March 2006 meeting.

In conclusion, Professor Resnick said that the advisory committee should approve a complete set of amendments to the national rules and official forms at its March 2006 meeting and publish them for public comment in August 2006. The revisions, therefore, will be on track under the regular Rules Enabling Act process, and the revised national rules would become effective on December 1, 2008.

Mr. McCabe added that the Act also contains a number of provisions that adversely impact the finances of the federal judiciary. For example, it allows debtors to petition for filing in forma pauperis. If the petition is granted, the judiciary loses its designated portion of the filing fee, which is used to fund basic court operations. Moreover, if the debtor does not pay a filing fee, there is no statutory authority in a chapter 7 case to pay the case trustee the $60 fee that funds the trustee's work. In addition, the Act imposes substantial additional work and costs on the courts. Among other things, the Administrative Office is required to compile and report substantial new statistics in areas that are of no direct concern to the business needs of the judiciary. The Act's requirements have required the Administrative Office to expedite development of a multi-million dollar new statistical infrastructure capable of receiving and processing the new statistics.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachment of December 15, 2005 (Agenda Item 7).

Amendment for Publication

FED. R. CIV. P. 8(c)

Judge Rosenthal reported that the advisory committee had only one action item to present. She explained that FED. R. CIV. P. 8(c) (pleading affirmative defenses) lists "discharge in bankruptcy" as one of the affirmative defenses that a party must plead. She said that bankruptcy judges had suggested to the advisory committee that the rule is incorrect because § 524 of the Bankruptcy Code specifies that a discharge voids any judgment obtained on the discharged debt. It also operates as an injunction against a creditor bringing any action to collect the debt. Therefore, a discharge is not an affirmative defense as a matter of substantive bankruptcy law.

Judge Rosenthal said that the advisory committee was seeking authority to publish a proposed amendment to eliminate "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c). She added, however, that the advisory committee did not plan to publish the amendment immediately, but would hold it for publication as part of a package of amendments at a later date.

The committee without objection approved the proposed amendment for publication at a later date by voice vote.

Informational Items

Style Project

Professor Cooper provided a status report on the work of the advisory committee in restyling the body of civil rules. He noted that the project to restyle all the federal rules of procedure had been initiated in the early 1990's by Judge Robert Keeton and Professor Charles Alan Wright. Their goal was to rewrite the rules to achieve greater clarity and ease of use without changing meaning or substance. In addition, they sought to eliminate inconsistencies and to use language consistently throughout the federal rules of procedure.

Professor Cooper pointed out that the Federal Rules of Appellate Procedure had been the first body of rules to be restyled. They were followed by the restyled Federal Rules of Criminal Procedure. Now, the Advisory Committee on Civil Rules had completed a style revision of all the Federal Rules of Civil Procedure, which it published for comment in February 2005. Professor Cooper noted that the advisory committee had received 21 written comments to date and had held one hearing in Chicago. The hearing, he said, was essentially a comprehensive round table discussion on the restyled rules with Gregory P. Joseph and Professor Stephen B. Burbank, who represented the views of a group of 21 distinguished lawyers and professors who had read the restyled rules carefully and provided detailed written comments to assist the advisory committee.

Professor Cooper noted that a majority of the reviewing group had expressed the view that the project to restyle the civil rules should not proceed further because it could introduce inadvertent changes in the meaning of rules and possibly lead to litigation and added transactional costs. It might also preclude a more comprehensive overhaul of the civil rules. He also reported that members of the reviewing group had expressed concern that if the entire body of civil rules were re-adopted as a package, the supersession clause of the Rules Enabling Act process might cause mischief by overturning statutory provisions. Professor Cooper responded, though, that the advisory committee was considering a number of options for dealing with this problem.

Judge Rosenthal added that there had been no supersession problems when the restyled criminal rules were promulgated. Professor Cooper agreed that the fears expressed at the time about the criminal and appellate rules had not been realized in practice. He noted, for example, that the Department of Justice had reported that lawyers in its various divisions had not experienced any problems with the other restyled rules. Three of the law professors at the meeting added that they regularly read all the reported decisions in their fields and have not seen a single problem to date with the restyled rules.

Judge Rosenthal said that much of the public commentary on the restyled rules had been very positive, adding that the new rules are much clearer, easier to understand, and easier to use. She said that the advisory committee had been extraordinarily disciplined in its work and had avoided making any changes in language where there could be a potential change in meaning. She also thanked the Litigation Section of the American Bar Association for its help in supporting the project and providing very helpful input.

Other Amendments Under Consideration

Judge Rosenthal reported that the advisory committee had been so occupied with the restyling and electronic discovery projects that it had put aside a number of other issues. She listed several future committee agenda items, including:

(1) Rule 15 (amended and supplemental pleadings) – whether to consider changes in the automatic right of a party to amend its pleading or in the provision allowing relation back of an amendment changing the party against whom a claim is asserted, if the plaintiff files a case without knowing the name of the defendant but later discovers the name;

(2) Rule 26(a)(2)(B) (pretrial disclosure of expert testimony) – whether reports should have to be filed by employees who only sporadically give expert testimony;

(3) Rule 30(b) (notice of deposition) – whether to address a number of problems and possible misuses of the rule in taking depositions of institutional witnesses;

(4) Rule 48 (number of jurors and participation in the verdict) – whether the rule should be amended to include a provision on polling the jury as found in FED. R. CRIM. P. 31;

(5) Rule 58(c)(2) (entry of judgment in a cost or fee award) – together with Rule 54(d)(2) (motion for attorneys' fees) and FED. R. APP. P. 4 (timing of a notice of appeal) – whether to examine the practical effect of the provisions that give a district judge discretion to suspend the time to file an appeal when a motion is filed for attorney fees;

(6) Rule 60 (relief from judgment or order) — whether the rule should be amended, or a new rule drafted, to authorize a district court to make "indicative rulings" on post-trial motions when a pending appeal has deprived it of jurisdiction; and

(7) Rule 56 (summary judgment) – whether the rule should be rewritten to provide time limits, specify standards for granting summary judgment, and cure the disconnect between the text of the rule and the way that summary judgment motions are actually litigated in the courts.

Finally, Judge Rosenthal said that the advisory committee has also had on its agenda for a long time a controversial suggestion to reexamine notice pleading in the civil rules. She said that a number of courts are tempted to impose heightened pleading requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker,* 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

Amendments for Publication

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

FED. R. CRIM. P. 1

Judge Bucklew explained that the proposed amendment to Rule 1 (scope and definitions) would merely incorporate the statutory definition of a "crime victim" set forth in the Crime Victims' Rights Act. She added that the statutory definition was quoted in full in the proposed committee note.

FED. R. CRIM. P. 12.1

Judge Bucklew said that the proposed amendment to Rule 12.1 (notice of alibi defense) would provide that a victim's address and telephone number not be given automatically to the defendant if an alibi defense is made. The amendment would give the court discretion to order disclosure of the information or to fashion an alternative procedure giving the defendant the information necessary to prepare a defense, but also protecting the victim's interests.

Two members questioned the language of proposed new subparagraph (b)(1)(B) that places the burden on the defendant to establish a need for the victim's address and telephone number. They said that the presumption should be reversed. Thus, the rule would provide that the defendant has the right to speak with the victim, and the government would have the burden of showing that there is a need to protect the victim's interests. One participant suggested that the advisory committee might consider drafting alternate versions of the provision and including both in the publication of the rules. Another suggested that the matter might simply be highlighted in the covering letter accompanying the publication.

FED. R. CRIM. P. 17

Judge Bucklew said that the proposed amendment to Rule 17 (subpoena) would require court approval to obtain a subpoena served on a third party that calls for personal or confidential information about a victim. The court could also require that the victim be given notice of the subpoena and an opportunity to move to quash or modify it.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require the court to consider the convenience of any victim in setting the place of trial.

FED. R. CRIM. P. 32

Judge Bucklew pointed out that the proposed amendments to Rule 32 (sentencing and judgment) would delete the current definition in the rule of a victim of a crime of violence or sexual abuse. The new, broader definition of a "crime victim," taken from the Crime Victims' Rights Act itself and incorporated in FED. R. CRIM. P. 1 (definitions), includes all federal crimes. The amended rule would also eliminate the current restriction that only victims of a crime of violence or sexual abuse are entitled to be heard at sentencing. The other proposed changes in the rule, she said, were relatively minor.

FED. R. CRIM. P. 43.1

Judge Bucklew explained that Rule 43.1 (victim's rights) was a completely new rule. She said that the advisory committee had debated whether to incorporate the changes implementing the Crime Victims' Rights Act into a single new rule or spread them throughout the rules. She said that the committee consensus was to place the principal changes in one rule.

Judge Bucklew said that subdivision (a) of the new rule deals with the right of a victim to receive notice of every public court proceeding, to attend the proceeding, and to be reasonably heard at certain proceedings. She noted that the government has the burden of using its best efforts to provide victims with reasonable, accurate, and timely notice of every court proceeding. Professor Beale added that paragraph (a)(3) uses the term "district court," rather than "court," to make sure that the rule does not provide a right to be heard in the court of appeals. This limitation tracks the language of the statute.

Some participants questioned whether all the provisions set forth in the proposed new rule are actually needed because most of them are specified in the Crime Victims' Rights Act itself. One participant noted, moreover, that FED. R. EVID. 615 already allows a court to exclude witnesses so that they cannot hear the testimony of other witnesses. Judge Bucklew and Professor Beale responded that victims' groups have argued strongly that pertinent provisions of the Act should be highlighted and located in the key provisions of the rules used every day by the bench and bar. They added that the advisory committee did not go beyond the substance of the statute itself in any way, but the committee was convinced that it was necessary to include some of the key victims' statutory provisions in the rules themselves.

One participant noted that the rules committees generally avoid repeating statutory language in the rules. Another added that the Standing Committee in its local rules project had discouraged the courts from repeating statutes in local rules because it can create style problems and lead to legal conflicts.

One member suggested that the new rule should not be numbered as Rule 43.1 because the preceding rule, FED. R. CRIM. P. 43, deals only with the presence of the defendant. He recommended that one of the open rule numbers, taken from abrogated rules, should be used. It was the consensus of the committee that an abrogated rule number should be used or the new rule placed at the end of the rules.

One member questioned the meaning of proposed subdivision (b), which states that the court must decide promptly "any motion asserting a victim's rights." Judge Bucklew explained that the main purpose of the amendment was to emphasize the need for the court to act promptly. Professor Beale added that the statute covers the matter and uses the word "forthwith." She said that the rule may not strictly be necessary, but it is politically important. Another member suggested that the rule should be limited to motions asserting a victim's rights "under these rules." The committee consensus was to include the additional language.

Judge Bucklew reported that paragraph (b)(1) states that the rights of a victim may be asserted either by the victim or the government. One member suggested that paragraphs (1) through (4) do not fit well under subdivision (b), but should become new subdivisions (c) through (f). Judge Levi recommended that the advisory committee consider whether renumbering of the provisions would be appropriate.

The participants suggested a number of other potential improvements in language and organization of the rule for the advisory committee to consider.

The committee without objection approved the proposed amendments and new rule, including the changes suggested by the members, for publication by voice vote.

Informational Items

Judge Bucklew reported that the Standing Committee had returned the proposed amendments to Rule 29 (judgment of acquittal) to the advisory committee for further consideration. She said that drafting the rule had been more difficult than anticipated. A subcommittee had been working on it, and the advisory committee expected to present a draft rule to the Standing Committee for action at its June 2006 meeting.

As revised, Rule 29 would allow a judge to deny a motion for acquittal before the jury returns a verdict, or to reserve decision on the motion until after a verdict. But if the judge decides to *grant* the motion of acquittal, the judge would have to wait until after the jury returns a verdict – unless the defendant waives double jeopardy rights. The proposed rule sets forth what the judge must tell the defendant in open court, and it addresses the substance of the defendant's waiver.

One member opposed the rule and said that the Standing Committee had not returned the rule to the advisory committee with an implied endorsement. Judge Bucklew responded that the instruction to the advisory committee was to produce the best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

Informational Items

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford,* the advisory committee would not move forward with any rule amendments dealing with hearsay. Judge Smith also reported that the advisory committee was considering a possible amendment governing evidence presented in electronic form.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Schiltz presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 9, 2005 (Agenda Item 10).

Judge Kravitz pointed out that the subcommittee included several practicing lawyers, and it was blessed with having Professor Schiltz as its reporter. He reported that the subcommittee's work had begun with a memorandum drafted by Professor Schiltz that outlined all the potential time-computation issues in the federal rules. The memorandum, he said, had been circulated to the committee reporters for comment and then considered at a subcommittee meeting in October 2005.

Judge Kravitz explained that the subcommittee was focusing at the moment on how time should be computed, rather than on the specific time limits scattered throughout the rules. The latter, he said, would be addressed later by the respective advisory committees.

Judge Kravitz noted that the subcommittee had decided preliminarily to propose a number of changes in how time is computed, the most significant of which would be to eliminate the "10-day rule," set forth in FED. R. CIV. P. 6(e) and counterpart provisions in the appellate, bankruptcy, and criminal rules. The existing rules, he explained, specify two different ways of counting time. If a time period specified in a civil, criminal, or appellate rule is 10 days or less, intervening weekends and holidays are excluded in the computation. But if a time period set forth in a rule is 11 days or more, weekends and holidays are in fact counted. (For bankruptcy rules, the dividing line is 8 days, rather than 11.) Judge Kravitz said that by abolishing the "10-day rule," all days would then be

counted in the future. And if the last day of a prescribed period is a weekend or holiday, the deadline would roll over to the next weekday.

Professor Schiltz said that in drafting a proposed model rule, the subcommittee had decided against simply eliminating the "10-day" language in the current rule. That approach, he said, might be too subtle and could be missed by lawyers. Instead, the proposed rule attracts attention to the change and tells the bar affirmatively to count every day or hour.

Judge Kravitz said that after the subcommittee makes its final recommendations, the individual advisory committees will take a hard look at the impact on each of the specific deadlines in their rules. For example, 10-day deadlines in the current rules would necessarily be shortened because the parties will no longer get the benefit of excluding weekends. The advisory committees, thus, might wish to increase some 10-day deadlines to 14 days.

He added that the time-computation subcommittee was comprised largely of members of the advisory committees. The members, he said, would be expected to go back to their respective advisory committees and take a leading role in examining and adjusting the deadlines. Judge Kravitz added that the subcommittee's recommendations would be completed by early 2006, circulated to the advisory committees for comment, and considered by the Standing Committee in June 2006. After reviewing all the comments, the subcommittee would send its recommendations to the advisory committees and ask them to proceed with making any needed changes in their deadlines.

Judge Kravitz reported that the subcommittee had also considered amending the time-computation rules to take account of electronic filing and service. Anticipating that electronic filing and service will become virtually universal in the future, the subcommittee discussed eliminating the provision that gives a party three additional days to act after being served by mail, electronically, or by leaving papers with the clerk's office. He pointed out that the practicing attorneys on the subcommittee were strongly of the view that as long as mail remains a service option, the three additional days must be retained. But, he said, even though the additional three days had been provided to encourage the use of electronic service, that incentive is probably no longer needed. Judge Kravitz said that the subcommittee needs to address the three-day rule, and it would likely decide to retain the three-day rule for mail but eliminate it for other kinds of service.

In addition, Judge Kravitz said, the subcommittee had drafted a provision to calculate time periods stated in hours, rather than days. Professor Schiltz explained that the subcommittee had drafted a simple rule that would extend a deadline by 24 hours if the last day falls on a weekend or holiday.

Judge Kravitz said that the subcommittee had also addressed the issue of "backwards counting," such as in computing the deadline for a party to file a paper in advance of a hearing or other event. Professor Schiltz pointed out that the proposed draft states that when the last day is excluded, the computation "continues to run in the same direction," *i.e.,* backwards. Thus, if the final day of a backward-looking deadline falls on a Saturday, the paper would be due on the Friday before the Saturday, not on the Monday following the Saturday.

Judge Kravitz reported that the subcommittee also considered whether all time limits in the rules should be expressed in seven-day increments, but decided not to mandate such a rule. Rather, it would encourage the advisory committees to keep such a protocol in mind as they adjust deadlines in response to the subcommittee's new time-counting rule.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. He noted that proposed amendments to the rules had been published in August 2005 to implement section 205 of the E-Government Act of 2002. The legislation requires the Supreme Court to prescribe rules –

> "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Fitzwater reported that some comments had been received on the proposed rules, but there had been only one request to testify at a scheduled public hearing. He also noted that he had recently attended a conference at which some concern had been expressed regarding the viability of the two-tier access system contemplated in the proposed rules, under which certain sensitive records would be made available at the courthouse, but not on a court's web site.

One of the members pointed out that many of the provisions dealing with electronic filing are set forth in local court standing orders and general orders, rather than in local court rules. He suggested that it would be very helpful if the committee provided guidance to the courts and circuit councils as to what matters should be placed in local rules and what should be set forth in orders.

PANEL DISCUSSION ON THE LEGACY OF CHIEF JUSTICE REHNQUIST

Judge Levi explained that he had asked former committee member Charles Cooper and current committee member Judge Kravitz to put together a panel reflecting on the rich legacy of the late Chief Justice William H. Rehnquist and his contributions to the federal rulemaking process. He noted, though, that after putting the program together, Mr. Cooper was unable to attend because of a last-minute conflict. Judge Levi noted that both Judge Kravitz and Donald Ayer had been law clerks of the late Chief Justice, and James Duff had served as the chief justice's administrative assistant, *i.e.,* chief of staff, from 1996 to 2000.

Judge Kravitz explained that he would speak about the personal qualities that impressed him most about the late Chief Justice when he had served as his law clerk. Mr. Ayer, he said, would then discuss the Chief Justice's legacy on the important issue of federalism. Finally, he added, Mr. Duff would speak about the Chief Justice as the administrative leader of the Third Branch and his support of the rules program.

Judge Kravitz noted that Mr. Ayer has an active appellate practice in Washington and had served in the past as the principal deputy to the Solicitor General, as Deputy Attorney General, and as the U.S. attorney for the Eastern District of California. Mr. Duff, he said, is the managing partner in the Baker Donelson law firm in Washington and also serves as the legislative counsel for the Federal Judges Association.

Judge Kravitz said that he had read many tributes to the late Chief Justice and saw a number of common themes reflected in them. The eulogists all recognized the same character traits in Chief Justice Rehnquist, namely: (1) how brilliant he was; (2) what a wonderful teacher he was; (3) how well he understood the Supreme Court as a decision-making body; and (4) how decent, modest, and normal he was for a person of such enormous stature and authority.

As for his brilliance, Judge Kravitz said, the Chief Justice's mind was encyclopedic and his memory prodigious. He had an amazing ability to memorize citations, and he knew details about every congressional district. He could cite poetry, Gilbert and Sullivan librettos, and literature by heart. He could also dictate completely polished opinions into a tape recorder without any editing.

He was a dedicated teacher who spent a great deal of time with his law clerks. He had regular conferences with his clerks, but he did not have them write bench memos. Rather, he would tend to go for a walk with the clerks on the Mall and talk to them about cases and upcoming issues and opinions. He saw it as a way of training the clerks to think on their feet, without notes. It was also his way of preparing for arguments.

As a training device, he would have the clerks write opinions on stays, even though not strictly needed. He told them that it was important for them to be able to write under pressure. He set very tough deadlines and had the clerks produce draft opinions within 10 days after argument. He also spent a great deal of time teaching the clerks about life and about family, and he was very interested in the clerks' plans for the future.

He was also a master of the politics of the Court and how the Court functioned as a decision-making body. He knew how to move the Court and how to marshal a majority of votes in a case.

Finally, Judge Kravitz added, William Rehnquist's most important quality was his basic decency. In some courts, he noted, disputes arise among the judges, and dissenters occasionally use uncivil language. But the Chief Justice was overwhelmingly civil and polite. He got along very well with his ideological opponents, and he knew that the best way to influence people was with kindness.

He deeply loved his family, and they were the most important thing in his life. His law clerks put on skits, and he was the butt of their jokes and loved it. In all, he had great common sense, pragmatism, and good judgment.

Mr. Ayer agreed with the observations of Judge Kravitz and said that the great successes of the Chief Justice had everything to do with who he was as a person. He was a phenomenon in melding all these great personal qualities, and he ended up being loved by all the members of the Court. Mr. Ayer emphasized that very few people in high places today possess the same qualities.

The Chief Justice, he said, was also a person with a vision and an indelible sense of what the Constitution is and should be. He had an agenda and knew where he wanted to go. Thus, over the course of 33 years on the Court, he moved the Court in his direction, particularly in cases involving religion, habeas corpus, federalism, and criminal procedure.

Mr. Ayer presented a scholarly review of the late Chief Justice's decisions regarding federalism – the area where he affected the law most profoundly. The Chief Justice's allegiance, Mr. Ayer said, was to the union intended by the founding fathers that balanced federal and state powers. He was an activist in trying to restore that balance of power and undo the expansions of federal power that began with the New Deal.

Mr. Ayer divided his detailed analysis of the federalism cases into three broad areas: (1) "commandeering," *i.e.,* where Congress orders the behavior of state employees; (2) narrowing the Commerce Clause power of the federal government; and (3) the 11th Amendment and sovereign immunity.

Mr. Duff concurred that William Rehnquist was an extraordinary man with a combination of great talents. His support of the rules process was no different from the approach he took with everything else. He was intimately familiar with all the agendas of the Judicial Conference committees, including items on the Conference's consent calendar. He invariably would ask penetrating questions about agenda items that went right to the heart of a matter.

In the late 1980s, before the Chief Justice streamlined the Judicial Conference's operating procedures, Conference sessions used to go on for several days, as each committee chair would read his or her report. Chief Justice Rehnquist, though, pushed most of the work from the Conference to its committees. He instituted the discussion and consent calendars, and he rotated the committee members and chairs. Nevertheless, he recognized that there is a need for greater continuity in the area of the federal rules, so he extended the terms of some rules committee chairs and members.

Mr. Duff said that the Chief Justice had an exacting sense of the separation of powers and the balance between the federal government and the states. He was also passionate about the independence of the judiciary. He recognized the important role of the rules committees, both in guiding Congress on procedural matters and in maintaining judicial independence.

Mr. Duff pointed to *Nixon v. United States,* involving the impeachment of a federal judge who had been convicted of perjury and imprisoned. Judge Nixon challenged the procedures chosen by the Senate in having a committee, rather than the full body, take the evidence at his impeachment trial. The opinion of the Supreme Court held that since the Constitution authorizes the Senate to conduct impeachment trials, the Senate can decide on its own procedures. He said that the decision was very important to the separation of powers and works ultimately to the benefit of the judiciary when it exercises its own powers. The rules committees, he said, need to exercise their authority over court procedures wisely and keep Congress from filling a vacuum with statutes.

Mr. Duff said that both sides of the aisle praised the Chief Justice for his leadership role in the impeachment trial of President Clinton. He pointed out that the chief justice and he had met with the Senate leadership to discuss trial procedure, and the exchanges had been very cordial. The chief justice had offered to conduct the trial as an ordinary trial, but the Senate had its own idea as to how the trial should be conducted. The Chief Justice, he said, was able to adapt very well to the Senate's rules.

In conclusion, Mr. Duff pointed out that in addition to his role as the leader of the Supreme Court, 84 different statutes give the chief justice administrative responsibilities.

Mr. Rabiej reported that the Chief Justice never announced his views regarding any rules proposal before the Judicial Conference. Nevertheless, he was able to affect the outcome of a proposal by shaping the procedure. For example, at its September 1999 session, the Conference had before it an important package of rules dealing with the scope of discovery and disclosure. Normally, only one rules committee chair would be allowed to speak. But with the 1999 package, the Chief Justice allowed both the chair of the Standing Committee and the chair of the civil advisory committee to address the Conference. He also decided who would speak first on an issue. Thus, he let both rules committee chairs speak first on the discovery rules package, before any opponent could speak. In addition, speakers normally would be given only five minutes to make a presentation, but the Chief Justice allowed the rules committee chairs a great deal more time. In the end, the 1999 rules package was approved by one vote.

Mr. Rabiej pointed out that several years ago, legislation had been introduced in Congress that would have required that a majority of the members of each rules committee be practicing lawyers. The Chief Justice, he said, made a number of phone calls, and the issue quickly died down. In addition, Mr. Rabiej said, the Chief Justice established the tradition of having the chair and the reporter of the Standing Committee meet annually with him to discuss the current and future business of the rules committees.

Judge Kravitz concluded the panel discussion by reading a letter from Judge Anthony Scirica, former chair of the Standing Committee, emphasizing how supportive Chief Justice Rehnquist had been in rules matters and how he had been the best friend of the rules process.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 22-23, 2006, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

3-A

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 26, 2006

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Twenty-three bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters.

Privilege Waiver

On January 23, 2006, House Judiciary Committee Chairman F. James Sensenbrenner, Jr., wrote to Judicial Conference Secretary Leonidas Ralph Mecham requesting that the Judicial Conference initiate rulemaking to address the waiver of the attorney-client privilege and work product protection. Chairman Sensenbrenner expressed concern that the inadvertent waiver of privilege and protection is causing significant expense and delay in the litigation process and urged the Conference to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings. Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule under the Rules Enabling Act. (See attached.)

Secretary Mecham responded to Chairman Sensenbrenner on February 13, 2006, advising him that the Advisory Committee on Evidence Rules would be holding a mini-conference in April 2006 to discuss the law of privileges and work product protection and that the advisory committee will be considering a proposed new rule on waiver of privilege and protection. (See attached.) At its April 24-25, 2006, meeting, the Evidence Rules Committee approved for publication proposed new Evidence Rule 502, which the Standing Committee will be considering at its June 2006 meeting.

Bankruptcy

The "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8) (hereinafter "the Act") did not provide sufficient time to prescribe national rules under the Rules Enabling Act. In August-September 2005, the Bankruptcy Rules Committee developed Interim Rules to implement the Act, which the Executive Committee then authorized for distribution to the courts to be adopted as local rules. The Bankruptcy Rules Committee has proposed amendments to the Federal Rules of Bankruptcy Procedure largely based on the Interim Rules.

On March 13, 2006, Senators Charles Grassley and Jeff Sessions wrote to Chief Justice Roberts expressing concerns that the Interim Rules did not faithfully implement the Act. Specifically, the senators indicated that the Interim Rules: (1) place an unfounded burden on creditors by requiring that motions to dismiss be filed "with particularity," and (2) fail to require the debtor's counsel to attest, under oath, to the accuracy of the debtor's schedules and statements. These concerns were raised in an earlier letter from Senator Grassley to Chief Justice Rehnquist on August 18, 2005. (In responding to Senator Grassley, Secretary Mecham wrote to the senator on September 15, 2005, informing him of the work of the Rules Committees to implement the Act. Secretary Mecham also enclosed a memorandum from Professor Jeffrey Morris, which responded that the Interim Rules did, in fact, implement the Act's provisions. See attached.)

The Bankruptcy Rules Committee considered these concerns at its March 8-10, 2006, meeting. The Committee concluded that the motion to dismiss must be pleaded with particularity to: (1) comply with general standards applicable to all motions under the Federal Rules of Bankruptcy Procedure; and (2) give the debtor enough information to properly respond. The Committee also concluded that amending the rules and Official Forms to reiterate the effect of an attorney's signature on a pleading was not necessary or appropriate because the statutory requirement is self-executing.

In addition to the above concerns, Senators Grassley and Sessions raised two new concerns with Official Forms 22A-C, the means-testings forms. The first questions whether the Official Forms satisfy the statutory requirement showing "how each such amount [income and calculations that determine whether a legal presumption of abuse arises] is calculated." The second suggests a possible double counting of the debtor's housing expenses as part of the means-testing calculations. On April 6, 2006, Secretary Mecham wrote the senators, advising them of the Committee's actions on their concerns. Secretary Mecham also enclosed another memorandum from Professor Morris, which responded that the means-testing forms are consistent with the statutory requirements. (See attached.) Secretary Mecham said that the Rules Committees would be considering afresh all comments on proposed permanent changes to the Federal Rules of Bankruptcy Procedure during the public comment period.

USA PATRIOT Act

In August 2005, the Rules Committees published for comment a proposed amendment to Criminal Rule 32(k), which would have required a court to enter its statement of reasons on a uniform judgment form prescribed by the Judicial Conference. In December 2005, the Criminal Law Committee approved a recommendation to the Judicial Conference that the Statement of Reasons form be separated from the Judgment and Conviction form. The Criminal Law Committee also recommended to the Criminal Rules Committee that the proposed amendment to Criminal Rule 32(k) require the use of both the Judgment form and Statement of Reasons form as approved by the Judicial Conference.

On March 9, 2006, the President signed the "USA PATRIOT Improvement and Reauthorization Act of 2005" (Pub. L. No. 109-177). Section 735 amends 28 U.S.C. § 994(w) to require the sentencing court to enter a written statement of reasons on a form issued by the Judicial Conference and approved by the United States Sentencing Commission. The legislation effectively rendered moot the Criminal Rules Committee's proposal to amend Criminal Rule 32(k). In light of the legislation, the Criminal Law Committee expressed its intent to withdraw its recommendation. The Committee voted to withdraw the proposed amendment at its April 2006 meeting. Judge Cassell wrote to Judge Bucklew on May 8, 2006, formally withdrawing the Criminal Law Committee's recommendations on the proposed amendment to Criminal Rule 32(k). (See attached.)

(In addition, Section 507 of the Act is similar to provisions in the "Streamlined Procedures Act of 2005," which generally limits federal habeas corpus review of state court convictions in capital and non-capital cases. *See* S. 1088 and H.R. 3035, 109th Cong., 1st Sess.)

Cameras in the Courtroom

On March 30, 2006, the Senate Judiciary Committee approved two bills that would permit televising proceedings in federal courts. S. 1768 would, among other things, amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings." (109th Cong., 1st Sess.) The legislation requires the Supreme Court to allow television coverage of all open sessions unless the Court decides, by a majority vote, that such coverage would violate a party's due process rights. S. 829 provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. ("Sunshine in the Courtroom Act of 2005," 109th Cong., 1st Sess.)

On November 9, 2005, the House passed the "Secure Access to Justice and Court Protection Act of 2005" (H.R. 1751, 109th Cong., 1st Sess.). Section 22 of the bill is similar to S. 829 and provides discretion to the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings. (The legislation also has a sunset provision that rescinds the authority of a district court judge three years after enactment of the Act.) In addition, H.R. 1751 authorizes the Judicial Conference to promulgate advisory

guidelines on the use of electronic media in the courtroom. There has been no further action on the legislation.

The Judicial Conference generally opposes cameras in the courtroom (*see, e.g.,* JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.) Justices Anthony Kennedy and Clarence Thomas spoke against legislation permitting televising Supreme Court oral arguments at a House Appropriations Subcommittee hearing on April 4, 2006. There is no provision governing televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Other Developments of Interest

Class Actions. Section 6 of the "Class Action Fairness Act of 2005" (Pub. L. No. 109-2) required the Judicial Conference to report by February 18, 2006, on actions taken by the Conference to improve the fairness of class action settlements and attorneys fees awards in class actions. In February 2006, the Executive Committee on behalf of the Judicial Conference adopted the report on class action settlements and attorney fee awards in class actions, which was submitted by the Committee on Rules of Practice and Procedure, and transmitted it to Congress. (See attached.)

Asbestos. In February 2006, the Senate postponed further consideration of the "Fairness in Asbestos Injury Resolution Act of 2005" (S. 852, 109th Cong., 1st Sess.). The bill's proponents fell one vote short of the necessary 60 votes to proceed. There has been no further action on the legislation and passage remains uncertain.

James N. Ishida

Attachments

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
109th Congress

SENATE BILLS

- S. 5 - *Class Action Fairness Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Senate Judiciary Committee reported bill favorably without amendment (2/3/05). Passed Senate by vote of 72-26 (2/10/05). Passed House by vote of 279-149 (2/17/05). Signed by President (2/18/05) (Pub. L. No. 109-2).
  - Related Bills: H.R. 516
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials.

    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.

    A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

— Section 4 also provides that a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. Section 4 adds additional grounds for excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts. Section 5 also provides that the court of appeals may consider an appeal from a district court's remand order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

— Section 7 states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

- S. 155 - *Gang Prevention and Effective Deterrence Act of 2005*
  - Introduced by: Feinstein
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Considered by Judiciary Committee (7/28/05).
  - Related Bills: H.R. 1279
  - Key Provisions:
    — Section 206 amends **Evidence Rule 804(b)(6)** to admit a statement offered against a party who conspired in a wrongdoing that resulted in the unavailability of the declarant.

- S. 256 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 2/1/05
  - Status: Referred to the Senate Committee on the Judiciary (2/1/05). Judiciary Committee reported favorably with amendments (2/17/05). Passed Senate by vote of 74-25 (3/10/05). Referred to House Committees on the Judiciary and Financial Services (3/15/05). House Judiciary Committee held mark-up session and ordered bill reported by vote of 22-13 (3/16/05). House Report 109-31 filed (4/8/05). Committee on Financial Services discharged (4/8/05). Passed House by a vote of 302 - 126 (4/14/05). Signed by the President (4/20/05) (Pub. L. No. 109-8).
  - Related Bills: H.R. 685
  - Key Provisions:
    — Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.
    — Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.
    — Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.
    — Section 419 directs the Judicial Conference, after consultation with the Executive Office of the United States Trustee, to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Judicial Conference to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.
— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."
— Section 435 directs the Judicial Conference to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.
— Section 601 amends **chapter 6 of 28 U.S.C.,** directing (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to compile such statistics and make them available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than July 1, 2008.
— Section 604 expresses the sense of Congress that (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.
— Section 716 expresses the sense of Congress that the Judicial Conference should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.
— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."
— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

[SA #26 amends 11 U.S.C. § 107 restricts public access to certain sensitive information of the debtor.]

- S. 737 - *Security and Freedom Enhancement Act of 2005*
  - Introduced by: Craig
  - Date Introduced: 4/6/05
  - Status: Referred to the Senate Committee on the Judiciary (4/6/05).
  - Related Bills: None
  - Key Provisions:

— Section 3 amends **18 U.S.C. § 3103** by requiring that notice be given to the subject of the search warrant within 7 days after execution of the warrant.

- S. 829 - *Sunshine in the Courtroom Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 4/18/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/18/05). Senate Judiciary Committee held hearing (11/9/05). Senate Judiciary Committee approved by vote of 10-6 (3/30/06).

  - Related Bills: None
  - Key Provisions:

    — Section 3 authorizes the presiding judge of an appellate court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. Section 3 also authorizes the presiding judge of a district court to permit the photographing, electronic recording, broadcasting, or televising of any public proceeding over which the judge presides. The Judicial Conference may issue advisory guidelines on the broadcast of court proceedings.

    — Section 4 contains a sunset provision that terminates the authority of a district court judge to allow the broadcast of district court proceedings three years after enactment of the Act.

- S. 852 - *Fairness in Asbestos Injury Resolution Act of 2005*
  - Introduced by: Specter
  - Date Introduced: 4/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/19/05). Senate Judiciary Committee held mark-up sessions (4/28/05, 5/11/05, 5/12/05, 5/19/05); Senate Judiciary Committee reported bill favorably by a vote of 13-5 (5/26/05). Placed on legislative calendar (6/16/05). Report No. 109-97 filed (6/30/05). Senate Judiciary Committee held hearing (11/17/05). Cloture motion to proceed invoked by vote of 98-1 (2/7/06). Motion to waive Congressional Budget Act failed by vote of 58-41 (2/14/06). Recommitted to Senate Judiciary Committee in accord with Budget Act (2/14/06).
  - Related Bills: H.R. 1957.
  - Key Provisions:

    — Section 302 provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. Exclusive jurisdiction rests in the circuit court where the claimant resides at the time the final order is issued. The circuit court must review the decision on an expedited basis.

    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also states that, except as provided, the remedies set forth shall be the exclusive remedy for any asbestos claim.

- S. 1088 - *Streamline Procedures Act of 2005*
  - Introduced by: Kyl
  - Date Introduced: 5/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/19/05). Committee hearing held (7/13/05). Committee consideration and mark-up sessions held (7/14/05, 7/28/05, 10/6/05, 11/16/05).
  - Related Bills: H.R. 3035
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 2254** to require federal courts to dismiss unexhausted claims with prejudice, unless the claim falls within limited exceptions for review.

    — Section 3 amends **28 U.S.C. § 2244** to limit amendments to a pending petition for writ of habeas corpus.

    — Section 4 amends **28 U.S.C. § 2254** to limit federal habeas review of a claim that was found by a state court to be barred procedurally or denied on the merits and on the ground that the claim was not properly raised under state procedural law.

    — Section 7 amends **28 U.S.C. § 2254** to impose time limits for a court of appeal to hear and decide an appeal in a habeas corpus proceeding from the district court

    — Section 11 amends **18 U.S.C. § 3771(b)** to provide that a victim of a crime in a habeas corpus proceeding be afforded the same rights as provided victims of crimes in federal criminal prosecutions under 18 U.S.C. § 3771(b).

- S. 1348 - *Sunshine in Litigation Act of 2005*
  - Introduced by: Kohl
  - Date Introduced: 6/30/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/30/05).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- S. 1739 - *To amend the material witness statute to strengthen procedural safeguards, and for other purposes*
  - Introduced by: Leahy
  - Date Introduced: 9/21/05

- Status: Read twice and referred to the Senate Committee on the Judiciary (9/21/05).
- Related Bills: None
- Key Provisions:

  — Section 1 amends **Criminal Rule 46(h)** by deleting the reporting requirement in Rule 46(h)(2). The legislation sets forth new reporting requirements under the bill.

- S. 1768 - *To permit the televising of Supreme Court proceedings*
  - Introduced by: Specter
  - Date Introduced: 9/26/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/26/05). Senate Judiciary Committee held hearing (11/9/05). Senate Judiciary Committee approved by vote of 12-6 (3/30/06).
  - Related Bills: None
  - Key Provisions:

    — Section 1 amends **28 U.S.C. Chapter 45** by adding a new § 678 that requires the Supreme Court to allow television coverage of all open sessions unless the Court decides, by majority vote, that such coverage would violate a party's due process rights.

- S. 1874 - *Alien Tort Statute Reform Act*
  - Introduced by: Feinstein
  - Date Introduced: 10/17/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/17/05).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends 28 U.S.C. § 1350 by, among other things, vesting district courts with original jurisdiction over a civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading. Section 2 may also affect **Civil Rule 9** by requiring that the complaint state specifically facts describing each alleged tort, reasons why the action may be brought under the section, and facts showing the defendant had specific intent to commit the alleged tort.

HOUSE BILLS

- H.R. 420 - *Lawsuit Abuse Reduction Act of 2005*
  - Introduced by: Smith
  - Date Introduced: 1/26/05
  - Status: Referred to the House Judiciary Committee (1/26/05). Referred to House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee discharged (5/20/05). House Judiciary Committee held markup session and reported bill, as amended, favorably by a vote of 19-11 (5/26/05). House Report No. 109-123 filed (6/14/05). House passed by a vote of 228-184 (10/27/05).

• Related Bills: None
• Key Provisions:
— Section 2 amends **Civil Rule 11** by requiring the court to impose an appropriate sanction upon attorneys, law firms, or parties who violate provisions of the rule.
— Section 3 would make **Civil Rule 11** applicable to state cases affecting interstate commerce.
— Section 4 generally provides that a personal injury claim filed either in state or federal court may be filed only in the state or federal district where (1) the person bringing the claim (a) resides at the time of filing, or (b) resided at the time of the alleged injury; (2) the alleged injury or circumstances giving rise to the personal injury claim occurred; or (3) the defendant's principal place of business is located.
— Section 6 amends Civil Rule 11 by requiring a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney has violated Rule 11 three or more times.
— Section 7 creates a rebuttable presumption that Rule 11 has been violated when a party litigates—in any forum—an issue previously litigated and lost on the merits on 3 consecutive prior occasions.
— Section 8 provides for enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents in the case. If the party is an attorney, the attorney shall also be held in contempt of court.
— Section 9 states that a court may not seal a Rule 11 proceeding unless the court finds that the justification for sealing outweighs any interest in public health and safety.

- H.R. 516 - *Class Action Fairness Act of 2005*
  • Introduced by: Goodlatte
  • Date Introduced: 2/2/05
  • Status: Referred to the House Committee on the Judiciary (2/2/05).
  • Related Bills: S. 5
  • Key Provisions:
    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, and review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location).
    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

These provisions do not apply in any civil action where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.

— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

- H.R. 650 - *Vaccine Accessibility for Children and Seniors Act of 2005*
  - Introduced by: Keller
  - Date Introduced: 2/8/05
  - Status: Referred to House Committees on Energy and Commerce and Judiciary (2/8/05).
  - Related Bills: None.
  - Key Provision:

    — Section 4 provides that a district court must suspend an attorney from the practice of law in that court for one year if the court finds that the attorney violated Civil Rule 11 three times in a lawsuit alleging damages arising from a vaccine-related injury associated with a vaccine administered after October 1, 1988.

- H.R. 685 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/9/05
  - Status: Referred to the House Committees on the Judiciary and Financial Services (2/9/05). Referred to the House Subcommittee on Commercial and Administrative Law.

(4/4/05). Referred to the House Subcommittee on Financial Institutions and Consumer Credit (5/13/05).
• Related Bills: S. 256

- H.R. 1038 - *Multidistrict Litigation Restoration Act of 2005*
  • Introduced by: Sensenbrenner
  • Date Introduced: 3/2/05
  • Status: Referred to the House Committee on the Judiciary (3/2/05). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee held mark-up session and forwarded to full committee (3/3/05). Judiciary Committee held mark-up session and ordered reported by voice vote (3/9/05). H. Rprt. 109-24 filed (3/17/05). Passed by House (4/19/05). Referred to Senate Judiciary (4/20/05).
  • Related Bills: None.
  • Key Provisions:
    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory damages.

- H.R. 1279 - *Gang Deterrence and Community Protection Act of 2005*
  • Introduced by: Forbes
  • Date Introduced: 3/14/05
  • Status: Referred to the House Committee on the Judiciary (3/14/05). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (4/5/05). Subcommittee held mark-up session and forwarded to full committee by vote of 5-3 (4/12/05). Committee held mark-up session and ordered reported by vote of 16-11 (4/20/05). House Report No. 109-74 filed (5/5/05). House passed by vote of 279-144 (5/11/05). Received in Senate and referred to Committee on the Judiciary (5/12/05).
  • Related Bills: H.R. 4472, S. 155
  • Key Provisions:
    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 1751 - *Secure Access to Justice and Court Protection Act of 2005*
  • Introduced by: Gohmert
  • Date Introduced: 4/21/05
  • Status: Referred to the House Committee on the Judiciary (4/21/05). Committee held mark-up session and ordered reported by vote of 26-5 (4/21/05). House Report No. 109-74 filed (11/7/05). House passed by vote of 375-45 (11/9/05). Received in Senate and referred to Committee on the Judiciary (11/10/05).
  • Related Bills: H.R. 1710, S. 829, S. 1968

• Key Provisions:

— Section 22 allows presiding judge of an appellate or district court to permit the photographing, recording, or televising of court proceedings. (The legislation also has a sunset provision that rescinds the authority of a district court three years after enactment of the Act.) The legislation also authorizes the Judicial Conference to promulgate advisory guidelines in the use of electronic media in the courtroom.

- H.R. 3035 - *Streamline Procedures Act of 2005*
  - Introduced by: Lungren
  - Date Introduced: 6/22/05
  - Status: Referred to the House Committee on the Judiciary (6/22/05). Referred to Subcommittee on Crime, Terrorism, and Homeland Security (6/27/05). Subcommittee hearing held (6/30/05 and 11/10/05).
  - Related Bills: S. 1088
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 2254** to clarify when the applicant has exhausted state-court remedies.

    — Section 3 amends **28 U.S.C. § 2244** to clarify when an application for writ of habeas corpus may be amended.

    — Section 4 amends **28 U.S.C. § 2254** to clarify the grounds when a federal court may consider claims found by a state court to be barred procedurally.

    — Section 8 amends **28 U.S.C. § 2254** by establishing time limits for reviewing and deciding an application for writ of habeas corpus.

- H.R. 3060 - *Terrorist Death Penalty Enhancement Act of 2005*
  - Introduced by: Carter
  - Date Introduced: 6/24/05
  - Status: Referred to House Committee on the Judiciary (6/24/05). Referred to the Subcommittee on Crime, Terrorism and Homeland Security (6/27/05). Subcommittee held hearing (6/30/05).
  - Related Bills: H.R. 1763
  - Key Provision:

    — Section 301 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 3199 - *USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*
  - Introduced by: Sensenbrenner
  - Date Introduced: 7/11/05
  - Status: Referred to House Committee on the Judiciary and Intelligence (7/11/05). Judiciary Committee held mark-up session and ordered reported by vote of 23-14 (7/13/05). Judiciary and Intelligence Committee Report No. 109-174 filed (7/18/05). House passed by vote of 257-171 (7/21/05). Passed Senate with an amendment

(substituted text of S. 1389) (7/29/05). Senate requests conference (7/29/05). House appointed conferees (11/9/05). House Report No. 109-333 filed (12/8/05). House approved Report No. 109-333 by a vote of 251-174 (12/14/05). Cloture not involved in Senate by a vote of 52-47 (12/16/05). Senate agreed to Conference Report by vote of 89-10 (3/2/06). Signed by President (3/9/06). Public Law No. 109-177 (3/9/06).

• Related Bills: S. 1266, S. 1389, S. 2082, S. 2118, S. 2167, HR 4506, HR 4647.

• Key Provision:

— Section 231 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.

[Section deleted in compromise legislation.]

— Section 735 amends 18 U.S.C. § 994(w) and requires the sentencing court to submit certain information, including the statement of reasons, in a format approved by the U.S. Sentencing Commission.

- H.R. 3433 - *Parent-Child Privilege Act of 2005*

• Introduced by: Andrews

• Date Introduced: 7/26/05

• Status: Referred to House Committee on the Judiciary (7/26/05). Referred to Subcommittee on Courts, the Internet, and Intellectual Property (8/23/05).

• Related Bills: None.

• Key Provision:

— Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed new Evidence Rule 502(b), neither a parent nor a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and child.

- H.R. 4472 - *Children's Safety and Violent Crime Reduction Act of 2005*

• Introduced by: Sensenbrenner

• Date Introduced: 12/8/05

• Status: Referred to the House Committees on the Judiciary and Ways and Means (12/8/05). House considered bill under suspension of rules and passed by voice vote (3/8/06). Received in Senate (3/9/06) and placed on Legislative Calendar (3/16/06). Read second time and placed on Legislative Calendar (3/27/06).

• Related Bills: H.R. 1279, S. 155

• Key Provisions:

— Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res.

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ONE HUNDRED NINTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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January 23, 2006

Mr. Leonidas Ralph Mecham
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ralph:

I write to request that the U.S. Judicial Conference initiate a rule-making on forfeiture of privileges.

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

The expense in reviewing an enormous volume of papers, electronic files, and other materials in intensive discovery cases can represent a major component of litigation costs, which continue to rise. Lawyers are often compelled to expend countless hours screening vast quantities of documents to guarantee that any document produced in response to a discovery request does not include a privileged document for fear that the disclosure will waive the privilege for all other documents dealing with the same subject matter.

Parties occasionally try to facilitate the discovery process by agreeing to make discovery without forfeiting privileges so that any claim of privilege can be selectively asserted at a later date. Sometimes these agreements are approved by court order. Yet these agreements, even with a court

CNG-717

order, do not provide adequate assurances that the privilege will not be deemed waived in other proceedings or in other fora. The same difficulties can arise when disclosure is made voluntarily to a regulatory or governmental agency.

I understand that implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act. Separate legislation would also be needed to extend the rule's protection to subsequent litigation in state court.

A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants. My Committee looks forward to working with the Judicial Conference on this important matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/bsm

cc: Chief Judge David F. Levi

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

February 13, 2006

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of January 23, 2006, requesting the Judicial Conference to initiate the rulemaking process to address litigation costs and burdens arising from the review of attorney-client and work-product information. I have sent your request to the Advisory Committee on Evidence Rules for its consideration.

I understand that the Evidence Rules Committee is planning to hold a mini-conference with attorneys, academics, and judges expert in privilege law at the Fordham University School of Law in New York City on April 24-25, 2006. The Committee will consider a draft proposal that protects parties from waiving attorney-client privilege or work-product protection when information is inadvertently disclosed in discovery, when information is disclosed in accordance with the parties' agreement or a court order, or when information is disclosed by a party cooperating with a government agency in an investigation preceding the litigation. The Committee would welcome you or your staff at the New York City conference. In any event, we will keep you posted of progress on this important issue.

We appreciate your continuing support of the rulemaking process. If you need further assistance in this matter, please contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable David F. Levi, Chair,
Committee on Rules of Practice and Procedure
Honorable Jerry E. Smith, Chair,
Advisory Committee on Evidence Rules

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

April 6, 2006

Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington DC 20510-6276

Honorable Jeff Sessions
United States Senate
335 Russell Senate Office Building
Washington DC 20510-0104

Dear Senators Grassley and Sessions:

Chief Justice John G. Roberts asked me to respond to your letter of March 13, 2006, which raises concerns about provisions in certain Interim Bankruptcy Rules adopted by the courts and Official Forms promulgated by the Judicial Conference in August 2005, implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

The Act's general effective date of 180 days after enactment did not provide sufficient time to promulgate Official Forms and national rules under the exacting scrutiny procedures provided under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. The Judicial Conference's Advisory Committee on Bankruptcy Rules was compelled to engage in an intensive effort beginning in April 2005 to develop Interim Rules and amended or new Official Forms within the short time provided under the Act. The advisory committee worked closely with the Department of Justice's Executive Office for United States Trustees. It also consulted with experts in the area, including persons who participated in the drafting of the legislation and representatives of creditors' and debtors' organizations. The Official Forms and Interim Rules implementing the Act that took effect in October 2005 have been well received. The advisory committee continues to consider making appropriate adjustments to them based on the experiences of the public, bench, and bar.

The advisory committee recognizes the inherent limitations of the abbreviated rulemaking process that was used in promulgating the Official Forms and Interim Rules in August 2005. In accordance with the Rules Enabling Act rulemaking process, the advisory committee is proposing new and amended Federal Rules of Bankruptcy Procedure that are largely based on – and intended to replace – the Interim Rules. The proposed rules will be published for a six-month public-comment period in August 2006. The Official Forms that are in effect today are also being published for comment together with the proposed rules. Through this process, persons interested in the bankruptcy process can offer their comments and suggestions to the advisory committee for its consideration. At the same time, the advisory committee is also proposing amendments to an Interim Rule and to several Official Forms that require immediate attention to take effect in October 2006.

The advisory committee will consider all comments submitted on the Official Forms and amended rules at its spring 2007 meeting. The Judicial Conference's Committee on Rules of Practice and Procedure at its June 2007 meeting will consider any revisions proposed by the advisory committee in light of the public comment. If approved by the Judicial Conference, the amended rules would be transmitted to the Supreme Court and later to Congress for approval, with a targeted effective date of December 1, 2008. Some of the proposed revised Official Forms would take effect in September 2007, while others would take effect in December 2008 to coincide with the effective date of the proposed rule amendments.

Among the comments submitted from the bench, bar, and public on the revised and new Official Forms and Interim Rules were concerns first raised by Senator Grassley in his letter of August 18, 2005. (Two of the senator's concerns are again raised in the March 13, 2006, letter.) The advisory committee considered these concerns at its March 2006 meeting. After a substantial discussion, it concluded that a motion to dismiss must be pleaded with particularity to comply with the general standards applicable to all motions filed in a bankruptcy case. In addition, the motion to dismiss must be pleaded with some specificity to allow the debtor to respond with a proper answer. The advisory committee also determined that amending the rules or Official Forms to reiterate provisions in the Bankruptcy Code governing the effect of an attorney's signature on a pleading is not necessary or appropriate, because the statutory requirement is self-executing. For these and other reasons stated in the enclosed September 15, 2005, response to Senator Grassley, the advisory committee has deferred revising the Official Forms or rules relating to these concerns. It will study the matter further during the public-comment period.

Your letter also raises two new concerns with Official Forms B22A-C, the means-testing forms. The advisory committee will consider these concerns as part of its responsibility to review all comments submitted on the Official Forms when they are published for comment later this year. The advisory committee's reporter, Professor Jeffrey Morris, was asked to review these concerns. His detailed reply is enclosed. As a preliminary matter, he concludes that these

further the possibility of adding a provision governing the effect of an attorney's signature on a pleading, a proposal the committee earlier declined to adopt.

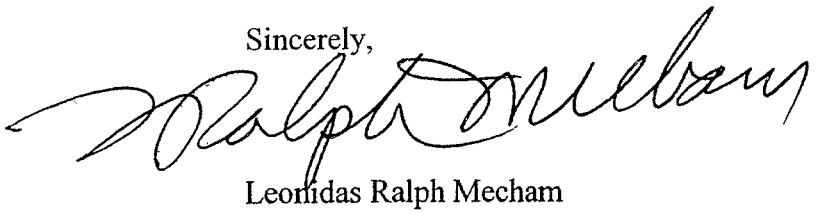
The first concern questions whether the Official Forms satisfy the statutory requirement to show "how each such amount [income and calculations that determine whether a presumption of abuse arises] is calculated." All individual chapter 7 debtors are required to report their income on Official Form B22A, as required under § 707(b)(2)(C) of the Bankruptcy Code. There are no exemptions. If a debtor's income level alone is equal to or less than the applicable median family income without taking into account authorized deductions, however, no presumption of abuse is established and there is no need for further calculations. The Act specifically states that no motion may be brought under § 707(b)(2) if the debtor has an income equal to or less than the applicable state median. In these cases, debtors are excused from listing authorized expense deductions, which can only reduce their income level and strengthen the grounds showing that there is no abuse. Accordingly, if the income level is equal to or less than the applicable median family income, no further calculations are necessary and the form does not require it, which is consistent with the statutory requirements. Importantly, a debtor must still report in detail all income and expenses on separate Schedules I and J. Furthermore, § 521(a)(1)(B) of the Bankruptcy Code requires the debtor to file copies of payment advices and a statement of monthly income with the court. Interim Rule 4002(b)(2)(A) and Official Form 22A (lines 2-10) implement those requirements.

The second concern suggests a possible double counting of a debtor's mortgage expenses as part of the means-testing calculations. Each debtor is entitled to a housing and utilities allowance as determined by the IRS. But because the debtor is also entitled to a deduction for actual mortgage payments, the means-testing form (Official Form B22A) reduces the IRS allowance by the actual mortgage payment to prevent double counting. The form is consistent with the statutory requirement, giving effect both to a debtor's mortgage payments actually made and the general housing and utilities allowance without double counting. As noted, the enclosed reporter's memorandum fully addresses these concerns.

The advisory committee is looking forward to public comments on the Official Forms, including the means-testing forms, and proposed rules amendments that were based on the Interim Rules and used by the courts since October 17, 2005. The experiences of the bench, bar, and public with these Official Forms and Interim Rules will inform the committee's consideration of whether any further changes are needed. In this context, the advisory committee will examine afresh any new suggestion or comment submitted on the Official Forms and Interim Rules that might implicate a matter that the committee had earlier addressed, including the concerns raised in your letter.

The advisory committee appreciates your comments. If you or your staff have any questions on these matters, please contact Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at 202-502-1800.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosures

cc: Chief Justice John G. Roberts
Honorable David F. Levi
Honorable Thomas S. Zilly
Honorable Arlen Specter
Honorable Patrick J. Leahy
Honorable Orrin Hatch

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

TO: **HON. THOMAS ZILLY**
CHAIR, ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: **JEFF MORRIS, REPORTER**

RE: **COMMENT SUBMITTED BY SENATORS GRASSLEY & SESSIONS**

DATE: **MARCH 24, 2006**

On March 13, 2006, Senators Chuck Grassley and Jeff Sessions sent a comment on the Bankruptcy Rules to Chief Justice Roberts. Their comment, logged into the Interim Rules Comment Docket as 05-BR-033, raises several issues regarding the rules under consideration by the Committee for recommendation to the Standing Committee for publication in August 2006.

OFFICIAL FORM B22A-MEANS TEST

The Senators' first issue relates to the operation of the Means Test Form in chapter 7 cases. Official Form B22A, line 15, provides that if the debtor's annualized monthly income (line 13) is less than the applicable median family income (line 14), then the debtor is instructed not to complete parts IV through VII of the Form. The Senators urge that the Form be revised to "require all debtors to provide income figures." However, the Form does require all debtors to provide the income information. Parts V, VI, and VII that below-median-income debtors need not complete relate only to the recognition of expenses and the calculation of the § 707(b)(2) presumption based on those expenses. Part IV of the Form deducts from the annualized current income any amounts of a non-filing spouse that are not contributed to the household. The Form does not permit debtors to avoid setting out their income in full. Consequently, the Form seems to do what the senators ask that it should do.

Their letter also notes that Official Form B22A "directs the debtor not to provide the needs-based calculations if the debtor's income is below the state median income." This is an accurate statement regarding Official Form B22A. The Advisory Committee, with the concurrence of representatives of the United States Trustee Program, considered on several occasions whether the Form should require all debtors to complete the entire Form, including the portion of the Form that sets out the debtor's living expenses. After due consideration, the Committee concluded that it was unnecessary for debtors to complete those portions of the Official Form. The reason for excepting them from this requirement was that § 707(b)(7) specifically prohibits any party, including the court, from moving to dismiss a debtor's case as an abuse under § 707(b)(2) if the debtor's annualized current monthly income is less than the applicable State median income. Thus, debtors would be required to complete a Form to generate information for which there is no use.

Additionally, the Senators' letter suggests that the Congress and the Senate Judiciary Committee rejected any exemption from the filing requirements. While this portion of the letter seems to be directed entirely towards income reporting, I have already noted that there is no income reporting exception in Form B22A. If the letter is intended to suggest that Congress intended no exemption for any debtor from reporting the living-expense deductions, I still believe that the Committee's action in exempting debtors whose income is below the State median income from this obligation is consistent with both § 707 and the intent of Congress.

Section 707(b)(2)(C) requires that a debtor's schedule of income and expenditures state "the debtor's current monthly income, and the calculations that determine whether a presumption arises under" § 707(b)(2). Since no party can bring a motion based on the presumption of abuse if the debtor's income is below the applicable State median income, the calculation that is "necessary" to determine whether the presumption applies is the debtor's annualized current monthly income if that number is less than the applicable State median income. I believe this is an appropriate interpretation of § 707(b)(2)(C), and I believe also that it is consistent with the intent of Congress, as best I can determine it.

For example, in the floor debate in the Senate on March 8, 2005, Senator Sessions, in response to Senator Durbin, stated that "I said in my remarks that if you make below median income, you are not subject to the means test. I guess that technically may be a misspeaking. What I meant was you are not required to pay anything back under chapter 13. He said, well, why fill out the forms? Well, you fill out the forms to see whether your income falls below the median income in America; that is why you fill out the forms." 151 Cong. Rec. at S2219-20 109th Cong. 1st Sess., March 8, 2005). At one point, Senator Sessions thereafter yielded the floor to Senator Durbin who asked "if I have done all of the basic filing [Schedules of Assets & Liabilities] and I disclosed my monthly income and I am below median income, than I do not have to fill out the forms for the Means Test; it does not apply to me....is that the Senator's understanding of what this law says?" Senator Sessions replied "I think that is my understanding of it." Id. at S2221.

Senator Durbin also introduced Amendment No.110 which would have amended § 707(b)(7) to provide in part that "a debtor described in this paragraph need only provide the calculations or other information showing that the debtor meets the standards of this paragraph." Senator Durbin asserted that the amendment should have been non-controversial because it was consistent with the positions that supporters of the bill had taken throughout its consideration. That is, the safe harbor provision of the means test prevents it from adversely impacting low income debtors. In response, Senator Sessions stated that "the issues that he [Senator Durbin] raises are really covered by the bill. If someone, anyone, is disabled and they have a continuing extra medical expense, that would be considered in whether or not they would ever have to pay any of their debts back. If their income is below median income, they would never be required to pay their debts back. All they would have to do is introduce some evidence from their pay stubs or their income tax, what their income is. Certainly we have the right to ask that before we discharge, wipe out, eliminate all debts, as people do when they come into bankruptcy." Id. at S2221. Further, Senator Hatch opposed Amendment 110 stating that "If you are below the State median income, you are not subject to the means test. It is as simple as that." Id.

It is certainly consistent with this legislative history to conclude that Congress determined that a specific amendment excepting all debtors from the obligation to complete the living expense calculations for the Means Test if their income is below the state median income was unnecessary. The Advisory Committee, with the concurrence of the United States Trustee Program, has worked from this understanding of the legislative history in its efforts to discern the Congressional intention. Furthermore, the Committee assumed that Congress did not intend to make debtors engage in a disclosure exercise that would produce information that could not be used to support a motion to dismiss the case under § 707(b)(2).

HOUSING EXPENSE AND MORTGAGE PAYMENTS

In § 707(b)(2)(A)(ii)(I), the debtor is directed to deduct the "applicable monthly expense amounts specified under the National Standards and Local Standards...issued by the Internal Revenue Service for the area in which the debtor resides." That section further provides that "notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." This creates a potential conflict in that the IRS National Standards and Local Standards include a mortgage or rental expense among those standards. In fact, the Committee has received comments urging that debtors be allowed to deduct both the actual mortgage payment and the IRS housing expense under § 707(b)(2)(A)(iii). The Committee rejected these arguments as creating a situation in which debtors could "double dip" in a manner that did not seem to the Committee to be consistent with the intent of Congress even if a statutory construction argument could be asserted in support of such a position. Rather, the Committee concluded that Congress had intended to establish the IRS housing standards as the cap for those housing expenses. That is, a debtor could claim no more than the amount of the allowed housing expense even if their current rent or mortgage payment exceeded that figure.

The Committee's study of the Act led to the conclusion that it was the intent of Congress to establish relatively uniform standards for the living expenses of debtors. Specifically, the

statute provides that "the debtor's monthly expenses **shall be** the debtor's applicable monthly expense amounts **specified under the National Standards and Local Standards**" of the IRS. In the Committee's view, this statutory directive means that the debtor must use the appropriate IRS living allowance amount in calculating the means test. Moreover, using these expense numbers in that manner promotes uniformity within the bankruptcy system. That uniformity would be disrupted if the housing expenses of debtors varied from one debtor to another even if the debtors' income, family size, and location were the same. Thus, the Committee concluded that the IRS housing expense was intended by Congress to be available to all debtors similarly situated to the same extent.

Limiting debtors to lower amounts for housing would also discourage debtors from seeking out more affordable housing since their allowed expenses would be higher if they lived in more expensive quarters. We did not believe that Congress intended to encourage debtors to seek more expensive housing than they might otherwise select. For example, for a debtor with a family of four in Des Moines County, Iowa, the IRS local living allowance totals $1038. Those figures are broken into mortgage/rent and non-mortgage/rent expenses of $581 and $457, respectively, for use in the means test. If a debtor resides in a home or apartment for which the mortgage or rental payment is less than $581, there would be an incentive for that debtor to move to a more expensive residence in order to take advantage of a higher living allowance under the means test if that test were applied as proposed by Senators Grassley and Sessions. The Committee did not believe that Congress intended to include such incentives to maximize the living allowances under the means test in this manner.

Two other examples illustrate the operation of the provision. If a debtor chooses to purchase an inexpensive home that requires significant repairs, he or she would be penalized under the Senators' proposed application of the statute because the debtor would be restricted to the same non-mortgage expense allowance as a person who purchased a more expensive home with less need for repairs. Similarly, a debtor who opts to live in a very cramped apartment in order to save money to cover the costs of parochial school for his or her children would be penalized under the proposal. The Committee concluded that Congress did not intend to impose these costs on debtors, nor did it intend to provide incentives for debtors to increase their mortgage or rental costs to take greater advantage of the Code. Instead, the uniform application of the IRS Standards leaves these lifestyle choices to the debtors rather than imposing an obligation on the courts to make decisions about the propriety of any particular expenses being allowed or disallowed.

PLEADING WITH PARTICULARITY FOR MOTIONS TO DISMISS

Section 707(b) contains another ground for dismissal of the case besides the debtor's failure to meet the means test. Under § 707(b)(3), a case may be dismissed if the debtor filed the petition in bad faith or if the totality of the circumstances demonstrates abuse. Unlike the means test set out in § 707(b)(2), the grounds for dismissal under § 707(b)(3) are neither precise nor based on any arithmetic calculation. Instead, they address more generalized grounds for dismissal of the case. It would be impossible to imagine every factual scenario that might be

presented which warrants dismissal of the case under § 707(b)(3), and the statute offers no particular directive. It leaves to the courts the determination of whether the particular circumstances of the case warrant dismissal.

A party in interest seeking dismissal of the case under § 707(b)(3) must necessarily have some basis for making the motion. Interim Rule 1017(e)(1) requires that the party filing the motion "state with particularity the circumstances alleged to constitute abuse." Requiring the movant to state the grounds with particularity is consistent with Bankruptcy Rule 9013, which has for many years required that motions "state with particularity the grounds therefor." Furthermore, because the statutory grounds for dismissal under § 707(b)(3) are intentionally very broadly stated, the Committee concluded that permitting these motions to be filed with only the most general allegations would likely cause every debtor to respond to the motion with a responsive motion for a more definite statement. The Committee concluded that reminding parties that file motions under § 707(b)(3) that Rule 9013 requires their motions to state the grounds for relief with particularity would streamline the process and avoid unnecessary delays in the resolution of these important matters. This requirement places no additional burdens on creditors seeking to obtain the dismissal of the case under § 707(b)(3). Rule 9013 already requires them to state their grounds with particularity, and the inclusion of that requirement in Rule 1017(e)(1) simply serves as a reminder to creditors of that obligation.

ATTORNEY CERTIFICATIONS

Senators Grassley and Sessions correctly note that § 707(b)(4)(C) & (D) provide that an attorney's signature "shall constitute a certification" regarding the attorney's investigation of the underlying facts contained on the petition, pleadings, or written motions. The Interim Rules do not include any provision to implement these subparagraphs of § 707(b). The Committee did not propose any such provision because the language of the statute is self executing. The Committee has generally operated on the assumption that a rule should not simply restate the statute, so statutory provisions that are self executing have no counterparts in the Bankruptcy Rules. For example, § 521(a)(5) requires the debtor to "appear at the hearing required under section 524(d)." Neither Bankruptcy Rule 4002 (Duties of Debtor) nor Rule 4008 (Discharge and Reaffirmation Agreement) includes that specific directive because the statutory language is sufficient.

Although the statute is self executing with regard to this issue, I would recommend that the Committee consider adding a provision to the rules that specifically restates the effect of these sections. Such a provision might be included as a part of Rule 9011, a rule that will be under consideration by the Committee's Subcommittee on Attorney Conduct over the next several months. The Committee would need to study the issue to determine the proper application of these requirements in the larger context of the Bankruptcy Rules. The certifications governed by § 707(b)(4) apply only in chapter 7 cases. Rule 9011 applies in all chapters. The Committee needs to study the impact of a chapter-specific certification such as that set out in § 707(b)(4). Among the issues that they must consider is whether Congress intended this standard to apply only in chapter 7 cases, anticipating that a different standard would apply in cases under the other chapters of the Code. Moreover, the Committee must

evaluate the effect of § 707(b)(4) when the case is converted to or from chapter 7. Given that the obligation is placed on attorneys in chapter 7 cases even in the absence of any rules to that effect, the Committee did not perceive a pressing need to amend Rule 9011 or propose any new rule to implement those provisions of the Code. More careful study is now possible without the time pressures presented by the 2005 Amendments, which required a wide range of procedural rules to implement that Act.

The comments of Senators Grassley and Sessions relate to the Interim Rules proposed by the Committee and, ultimately, the Judicial Conference for adoption by local courts. At this time, the Committee is reconsidering those rules for recommendation to the Committee on Rules of Practice and Procedure for publication in August 2006. After publication, interested parties will have six months to comment on the proposals. Those comments will be considered by the Advisory Committee, the Standing Committee and the Judicial Conference, in order, once they are made and prior to any recommended adoption of the Rules by the Supreme Court. The Advisory Committee certainly will be considering the comments of Senators Grassley and Sessions very carefully in its review of the proposed rules.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 16, 2006

The Honorable Charles E. Grassley
The Honorable Jeff Sessions
Subcommittee on Administrative Oversight
and the Courts
335 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Grassley and Sessions:

Thank you for your letter of March 13 regarding changes to the Bankruptcy Rules and forms that are being considered by the Advisory Committee on Bankruptcy Rules of the Judicial Conference. I have forwarded a copy of your letter to the Chair of the Committee, Judge Thomas S. Zilly.

I appreciate your taking the time to write. Please be assured that your views will be given careful consideration in what I know from experience is an exhaustive review process.

With all best wishes,

Sincerely,

John

cc: Judge Zilly

United States Senate

WASHINGTON, DC 20510

05-BR-033

March 13, 2006

The Honorable Chief Justice John Roberts
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

As you may know, PL 109-8 contains extensive revisions to the Bankruptcy Code designed to substantially reform America's bankruptcy process. We were active in moving this important legislation to passage and therefore have a keen interest in ensuring that the intent of Congress is fully effectuated as the new law is implemented.

The Committee on Practice and Procedure of the Judicial Conference is considering significant and comprehensive changes to the Bankruptcy Rules and Official Forms. Specifically, the Committee has developed forms to assist in calculating a debtor's income and to determine whether the presumption of abuse applies under Section 707(b)(2) of the Code. We wish to address a few of the shortcomings in the forms.

Section 707(b)(2)(C) of the Title 11 mandates that the schedule of current income and expenditures must include a statement of each debtor's income and the calculations that determine whether a legal presumption of abuse arises. Importantly, Form B22A directs the debtor not to provide the needs-based calculations if the debtor's income is below the state median income.

Form B22A should be revised to require all debtors to provide income figures. PL 109-8 does not exempt any debtor from the information filing requirement. Congress specifically chose not to create such an exemption. The Senate Judiciary Committee, on which we serve, specifically rejected such an exemption; the Judicial Conference should not create an exemption already rejected by Congress.

In calculating repayment ability, PL 109-8 permits a debtor to deduct the allowances provided in the applicable IRS local standards for housing. Importantly, PL 109-8 also provides that the debtor's expenses in this category may not include any payment for secured debts, such as mortgage payments. Thus, under PL 109-8, a debtor may deduct only the debt payments for mortgage payments actually paid. However, the forms authorize the debtor to deduct the greater of the debtor's mortgage payment or the IRS-specified amount. This clearly contravenes the plain language of the new law and flouts Congressional intent.

PL 109-8 also allows for creditors to move to dismiss a Chapter 7 proceeding if the court finds that granting relief under Chapter 7 would be an abuse of Chapter 7. This new creditor right is a central feature of the new bankruptcy system. Under the guise of protecting debtors from abusive filings, the Interim Rules now impose unnecessary pleading burdens (the so-called

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"specificity" requirement) on creditors who wish to file certain motions, burdens not authorized by statute. Congress deliberately chose to protect debtors from abusive motions practice in other ways. Thus, the "specificity" requirement should be dropped.

Finally, PL 109-8 adds § 707(b)(4)(C) and (D) to Title 11. These provisions provide that a signature of an attorney on a pleading constitute a representation by the attorney that the filing is not frivolous and that the debtor has performed a reasonable investigation to determine that the facts provided are accurate. The Committee should amend the rules and forms to ensure that attorneys comply with this requirement.

Thank you for considering our views on this subject. Given our involvement in this legislation's passage, we feel a responsibility to ensure that PL 109-8 is implemented according to the intent of Congress. We look forward to continuing dialogue on this important issue.

Sincerely,

Chuck Grassley
United States Senator

Jeff Sessions
United States Senator

cc: Peter McCabe
Secretary, Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

DC:456637.1

03/15/06 WED 10:20 FAX YOUTH VIOLENCE 003

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 15, 2005

Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington DC 20510-6276

Dear Senator Grassley:

Your August 18, 2005, letter to Chief Justice William H. Rehnquist, raising concerns about the judiciary's implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, was referred to me for response on behalf of the Judicial Conference of the United States. I appreciate the opportunity to share with you some of the details of the hard work undertaken by the Judicial Conference and the rules committees to implement this massive and complex legislation within a brief period of time.

Since the Act's enactment, the Advisory Committee on Bankruptcy Rules has been engaged in an intensive effort to determine the necessary changes in the rules and forms to implement the Act by the effective date, October 17. The general effective date of 180 days after enactment has not provided sufficient time to promulgate National Rules and Official Forms under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. This is normally a three-year process. The Committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules that could be adopted by October 17 and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the Federal Rules of Bankruptcy Procedure. Because the Interim Rules have not undergone the exacting scrutiny of the Rules Enabling Act rulemaking process, the Committee concluded that it should recommend at this time only those rules and forms absolutely necessary to implement specific provisions of the Act. The Committee intends to publish more extensive proposed National Rules in response to the Act no later than August 2006 with final adoption and an effective date of December 1, 2008. These rules will be more extensive than the Interim Rules and will reflect the intervening experience of the courts in applying the Act. The Committee will also have the benefit of additional time to study the Act and to hear from interested persons concerning the proposed rules.

The Advisory Committee completed its work on the Interim Rules and Official Forms in early August 2005 and requested the Committee on Rules of Practice and Procedure and later the

Executive Committee of the Judicial Conference to act on the recommendations now to provide timely notice so that the courts may prepare for the changes and so that the legal publishing firms would have sufficient time to print and make available the amended and new rules and Official Forms. On August 11, 2005, the Executive Committee, on behalf of the Judicial Conference, approved the amended and new Official Forms and authorized distribution of the Interim Rules and Official Forms to the courts to facilitate uniformity of practice until the Federal Rules of Bankruptcy Procedure are amended.

The Interim Rules are drafted so that they can be adopted by general order. The Advisory Committee expects that most courts will adopt the Interim Rules, which will provide uniform procedures for implementing the Act and at the same time supply a valuable base of experience for its ongoing work. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Acts' effective dates were issued. On each occasion, the courts uniformly adopted the Committee's interim rules recommendations. Unlike the Interim Rules, which courts are urged to adopt, the amended and new Official Forms must be observed and used with alterations as may be appropriate under Bankruptcy Rule 9009. The Interim Rules and Official Forms were transmitted to the courts on August 24, 2005. They can be found at <www.uscourts.gov/rules>.

The Advisory Committee worked closely with the Executive Office for the United States trustees in developing the Interim Rules and amended and new Official Forms. It consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the Committee's job all the more difficult. It reached out to many corners of the bar for assistance. It relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts were undertaken in an open fashion to ensure that the process remained transparent, a hallmark of the rulemaking process. The Committee's accomplishments are all the more impressive because they represent the work of volunteers, many of whom have made substantial sacrifices to see this massive work completed in a short period of time.

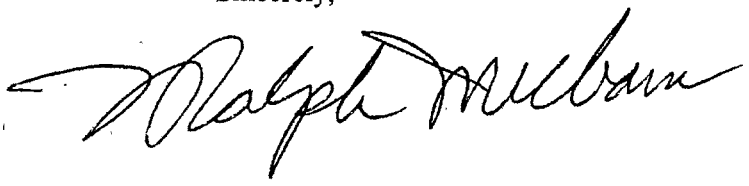
The Advisory Committee has received several comments and suggestions, including your comments, about the Interim Rules and Official Forms, which it will consider as part of its ongoing review at its upcoming meetings. In the meantime, the Bankruptcy Rules Committee's reporter, Professor Jeffrey Morris, was asked to review your concerns. The substance of his reply is attached to this letter.

The Advisory Committee recognizes the inherent limitations of its abbreviated review process. Recommending Interim Rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the

Act's fast-approaching effective date. But it is anticipated that any shortfalls in the Committee's work will be identified and corrected when the Interim Rules and the amended and new Official Forms undergo the exacting scrutiny of the regular rulemaking process, when permanent changes to the rules will be considered.

The Advisory Committee thanks you for your comments, which it will consider during the formal rulemaking process. If you or your staff have any questions on these matters, please contact Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at (202) 502-1800.

Sincerely,



Secretary, Judicial Conference
of the United States

Enclosure

cc: Justice John Paul Stevens
Honorable David F. Levi
Honorable Thomas S. Zilly
Honorable Arlen Specter
Honorable Patrick J. Leahy
Honorable Orrin Hatch

MEMORANDUM TO JUDGE THOMAS S. ZILLY

SUBJECT: Reply to Senator Grassley's Letter

FROM: Professor Jeffrey W. Morris

Motions Under § 707(b)(1) and (3)

The Advisory Committee carefully considered the pleading standard for a creditor's motion to dismiss. It concluded that a creditor's motion to dismiss under § 707(b)(1) and (3) should be stated with particularity to: (1) comply with Bankruptcy Rule 9013, which requires that every "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought;" and (2) facilitate consideration of the motion, which otherwise would be subject to a responsive motion for a more definite statement — delaying the proceeding.

The Act dramatically changed § 707(b) of the Code. Previously, a chapter 7 case could be dismissed only for "substantial abuse," and there was a presumption against dismissal. Under the Act, the presumption is removed, and a case can be dismissed on proof of "abuse." Also, creditors are now authorized to bring motions to dismiss. Of course, most dismissed cases will be dismissed for failing the means test under § 707(b)(2). If the debtor's projected income after expenses exceeds a stated amount, the case will either be dismissed, or converted to chapter 13.

For cases surviving the means test, the Act provides only that the case can be dismissed or converted if the court "finds that the granting of relief would be an abuse of the provisions of" chapter 7. In making that determination, the court must consider "(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances...." These grounds, unlike the very specific standards of the means test, are quite general. Congress seems to have selected these general standards to provide the courts with an opportunity to address these matters on a case-by-case basis. The United States trustees and creditors might allege as abusive a wide range of actions, transactions, and conduct under the Act's general standard. A rule that would allow these parties in interest to simply plead in the most general terms that the filing of a particular case is an abuse would not inform the debtor or other interested parties of the nature of the movant's objection. This would delay proceedings because a generic motion that simply states that the debtor's petition constitutes an abuse of chapter 7 would likely be met with a motion for a more definite statement of the grounds for the requested relief.

Moreover, by authorizing creditors to move for dismissal, the Act makes the creditors' actions subject to existing Bankruptcy Rule 9013. That rule has provided since 1987 that any "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Restating this standard in Interim Rule 1017(e)(1), which sets the deadline for filing these motions, serves to remind creditors that a motion to dismiss could theoretically be denied simply for failure to include sufficient information in the motion. If this requirement were not

expressly included in the Interim Rule, it would still apply to motions to dismiss under § 707(b), but creditors might not be as aware of the requirement.

Consequently, Interim Rule 1017(e)(1) requires that the motion state with particularity the circumstances that warrant the case's dismissal. The Advisory Committee does not believe that this requirement places an undue burden on creditors and will not deter them from raising appropriate motions under the Code.

Completion of Personal Financial Management Courses

Interim Rule 1007(b)(7) provides that "In a chapter 7 or chapter 13 case, an individual debtor shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form." The rule requires a *statement* of completion of a course in personal financial management, as opposed to a *certificate* of completion that is required under another section dealing with completion of prepetition credit counseling. The distinction is based on the plain language of the Act, which explicitly uses the different terms.

A comparison of the prepetition credit counseling obligation to the personal financial management educational obligation set out in the Act demonstrates why the Advisory Committee did not require the filing of a certificate from the education provider but did require the filing of a credit counseling certificate. Section 109(h)(1) requires the debtor to receive credit counseling prior to filing a voluntary bankruptcy petition. Section 521(b)(1) implements that eligibility limitation of § 109(h)(1) by requiring the debtor to file "a certificate from the approved nonprofit budget and credit counseling agency." Sections 727(a)(11) and 1328(g)(1) require the debtor to complete the personal financial management course, but there is no counterpart to § 521(b)(1) (debtor must file a credit counseling certificate) requiring the debtor to file a certificate relating to the personal financial management course. Thus, the Committee concluded that Congress considered these two matters as distinct, and the Interim Rules follow that Congressional determination.

Consumer Debtors' Attorney Certifications

In accordance with long established procedures, the Bankruptcy Rules are not amended to repeat the Code's provisions, but are amended to supplement the Code, when appropriate. An Interim Rule requiring the debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements is unnecessary, because the Code fully addresses this matter.

Section 707(b)(4)(D) provides that "the signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." This provision is self-executing in that the attorney's signature on the petition (as required by Official Form 1) "shall constitute a

certification...." There's nothing more, or less, that a rule could say. The duty to conduct an appropriate investigation is placed on the attorney with no need for a rule.

It would also be both impossible and unwise to establish by rule the actions that debtors' attorneys must take in conducting inquiries about their clients' assets. The extent of an investigation should vary according to the amount of the debtor's assets and liabilities, the presence or absence of questionable prepetition actions by the debtor, whether the debtor has sought bankruptcy relief in the past, and so on. The variables are infinite, and the Advisory Committee concluded that the courts will have to address the issue of the propriety of the nature and extent of an attorney's obligations under § 707(b)(4)(D) on a case-by-case basis. Over time, a body of law will develop that will help to set the parameters of that obligation, but it is not possible to set those limits in the absence of specific cases that present the issue. Furthermore, the Committee attempted to avoid adopting rules that would establish standards of behavior or require compliance with obligations that are not clearly set out in the statute. This was a deliberate choice so that the Committee would not be resolving matters in a manner that Congress might believe is inconsistent with its intention in enacting the Act.

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BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

05-BR-01

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

August 18, 2005

Chief Justice William H. Rehnquist
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Rehnquist:

As the principal sponsor of the newly-enacted bankruptcy reform law (Pub. Law 109-8), I am writing to express my concern over certain rules which have been proposed by the Judicial Conference to implement this legislation. In my opinion, the Judicial Conference will play a critical role in ensuring that Public Law 109-8 is implemented in a manner that is fully consistent with Congressional intent. The Rules Enabling Act specifically envisions Congressional involvement with the judicial rule-making process. Accordingly, I am communicating these views in that spirit.

First, I am concerned that the proposed rules would require that creditor motions to dismiss be filed "with particularity". This would impose an unnecessary burden on creditors that has no statutory basis in the new bankruptcy law. A fair reading of the statute and its legislative history clearly indicates that Congress wanted to encourage creditor motions, not unduly hamper them, by removing the prior law's absolute bar to section 707(b) creditor motions. In fact, Congress has already statutorily imposed restrictions on such motions in the new bankruptcy law. *See* Public Law 109-8, Section 102(a); 119 Stat. 30-31 (providing for sanctions for abusive creditor motions under section 707(b)). Creating a new, non-statutory hurdle for creditor motions is unwarranted and clearly contrary to Congress' intent in regulating motions practice under section 707(b).

I am also concerned that the proposed rules do not require debtors to file a certificate that they have completed the pre-discharge education course mandated under the new bankruptcy law, thereby creating a possible loophole for dishonest debtors to evade this important educational requirement. *See* Public Law 109-8, Section 106; 119 Stat. 37. This educational requirement is necessary for the public good because debtors need to learn about sound financial management. Reliance on mere assurances from debtors is not

sufficient to ensure that the educational requirement will serve the purpose that Congress intended, because past experience demonstrates that debtor statements are often unreliable. Thus, by failing to require proof of education as a condition for receiving a discharge, the Judicial Conference would significantly weaken this important component of the new law.

Finally, I am deeply troubled that the proposed bankruptcy rules and forms do not require debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements. Congress deliberately chose to impose new responsibilities on debtor's counsel in consumer cases to deal with fraudulent filings and to maintain the integrity of the entire bankruptcy system. *See* Public Law 109-8, Section 102(a); 119 Stat. 30 (the new law provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect"). The absence of any rule specifying how counsel should comply with their new responsibilities is, in my judgment, a serious and substantial oversight that must be corrected.

I understand that Interim Rules and Official Forms may be adopted this month. I believe that the defects that I have outlined above should be corrected before adoption of the Interim Rules in order to appropriately implement the new bankruptcy law.

Thank you for considering my concerns.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

CC: Thomas S. Zilly (Senior Judge)
United States District Court for the Western District of Washington
700 Stewart Street
Suite 15229
Seattle, WA 98101

COMMITTEE ON CRIMINAL LAW
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
112 Frank E. Moss United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Honorable Donetta W. Ambrose
Honorable Lance M. Africk
Honorable Julie E. Carnes
Honorable William F. Downes
Honorable Richard A. Enslen
Honorable José A. Fusté
Honorable David F. Hamilton
Honorable Henry M. Herlong, Jr.
Honorable Norman A. Mordue
Honorable Wm. Fremming Nielsen
Honorable William J. Riley
Honorable Thomas J. Rueter
Honorable Reggie B. Walton

Honorable Paul Cassell, Chair

TELEPHONE
(801) 524-3005

FACSIMILE
(801) 526-1185

May 8, 2006

Honorable Susan C. Bucklew
United States District Court
1430 Sam M. Gibbons United States Courthouse
801 North Florida Avenue
Tampa, FL 33602

Re: Withdrawal of Criminal Law Committee Recommendation

Dear Judge Bucklew,

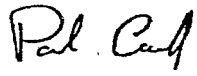
At its December 2005 meeting, the members of the Criminal Law Committee discussed the implications that a proposed change to Federal Rule of Criminal Procedure 32(k) might have on the latest version of the Statement of Reasons. While the Committee supported mandating a standardized judgment form (AO 245B/245C) to improve the collection, reporting, and analysis of sentencing data, the Committee also noted that the amended rule (as drafted) may require disclosure of the Statement of Reasons, contrary to Judicial Conference policy. *See* JCUS-MAR 01, p. 17.

After receiving guidance from staff at the Administrative Office, the Criminal Law Committee recommended to the Advisory Committee on Criminal Rules that the amendment to Rule 32(k) mandate the use of the judgment form (AO 245B/245C) promulgated by the Conference and that the Statement of Reasons remain confidential, while leaving the specifics of implementation to your Committee.

On March 9, 2006, however, the President signed into law the USA PATRIOT Improvement and Reauthorization Act, which, *inter alia*, amended 28 U.S.C. § 994(w) to require that the statement of reasons for the sentence imposed be "stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission."

The Criminal Law Committee continues to believe that the Statement of Reasons should remain a not-for-public-disclosure document, but because the new PATRIOT legislation has statutorily mandated the use of a standardized Statement of Reasons form, thereby mooting the need for amendment by rule, I wish to withdraw the recommendation of the Criminal Law Committee that the amendment to Rule 32(k) mandate the use of the judgment form (AO 245B/245C) promulgated by the Conference and that the Statement of Reasons remain confidential.

Sincerely,



Paul Cassell

cc: Honorable David F. Levi
Peter McCabe
John Rabiej

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON CLASS ACTION SETTLEMENTS

February 2006

Submitted to Committees on the Judiciary of the Senate and House of Representatives
in accordance with
Class Action Fairness Act of 2005 (Pub. Law No. 109-2).

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON CLASS ACTION SETTLEMENTS

February 2006

INTRODUCTION

This report is transmitted to the Committees on the Judiciary of the Senate and House of Representatives in accordance with § 6 of the Class Action Fairness Act of 2005 (Pub. Law No. 109-2). Section 6 directs the Conference to report no later than February 18, 2006, on (1) "the best practices that courts can use to ensure that proposed class action settlements are fair to the class members"; (2) "the best practices courts can use to ensure that" awards of attorney fees and expenses are appropriate; and (3) "the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report."

RULES ENABLING ACT

The Judicial Conference's Committee on Rules of Practice and Procedure and Advisory Committee on the Federal Rules of Civil Procedure engaged in an intensive study of Federal Rule of Civil Procedure 23, governing class actions, from 1991 to 2003. The rules committees initiated this study consistent with their duty under 28 U.S.C. § 331 to monitor the Civil Rules and to recommend changes and additions to promote simplicity and fairness and to reduce expense and delay. During the study's last four years the committees focused attention on the problems associated with settlements and attorney fee awards and carefully examined the courts' "best practices" in handling these matters — the same subjects that Congress targeted in § 6 of the Class Action Fairness Act. The amendments to Rule 23 that eventually resulted from the committees' parallel study were intended to accomplish the tasks set out in § 6 of the Act.

In March 2003, the Supreme Court, acting under the Rules Enabling Act, 28 U.S.C. § 2072, approved and transmitted to Congress amendments to Federal Rule of Civil Procedure 23 that took effect on December 1, 2003. The amendments to Rule 23 were largely based on the "best practices" of courts used to ensure the fairness of class action settlements and attorney fee awards in these actions. The amendments add requirements to Rule 23(e) governing settlement review and establish new rule provisions, Rule 23(g) and (h), governing the standards and criteria for appointing class counsel and approving attorney fee awards.

The amendments to Rule 23 were prescribed by the Supreme Court only after extensive scrutiny by the public, bench, and bar. The rulemaking process provided ample opportunity to comment on the proposed Rule 23 amendments. Many individuals and groups representing diverse viewpoints provided oral testimony at public hearings and written comments that resulted

in many improvements. The painstaking process was laborious, but it ensured that the problems associated with class action settlements and attorney fee awards and the best practices employed by courts to address them were raised and fully analyzed. Amended Rule 23 incorporated the best practices identified in this process, in the most helpful and effective way. The Judicial Conference approved these amendments to implement the courts' best practices on these matters and transmitted them to the Supreme Court in September 2003. Congress reviewed amended Rule 23 and allowed it to become effective on the schedule set by the Rules Enabling Act process.

Amended Rule 23 provides courts with rules-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The Committee Notes accompanying the amendments provide expansive guidance to the bench and bar in addressing these issues and focus on the best practices courts use to make sure settlements and attorney fees awards are fair. Copies of the amended rule and the Committee Notes are enclosed. The rules committees will continue to examine class action settlements and determine whether additional changes may be useful.

CLASS ACTION SETTLEMENTS

Rule 23(e) was substantially revised to strengthen the process governing the court's review of proposed class action settlements to assure fairness. The amended rule makes the standard for approving a settlement explicit: the settlement must be "fair, reasonable, and adequate." Specific factors to be considered by the court in its determination are referenced in case law cited in the Committee Notes and in the recently revised *Manual for Complex Litigation*. Before a court can approve a settlement, it must hold a hearing and it must make specific findings explaining why the settlement is fair, reasonable, and adequate.

Other amendments to Rule 23 were added to assure that class action settlements are fair. At the beginning of a class action, Rule 23(g) authorizes the court to appoint interim counsel to represent the putative class during the period before class certification. The Committee Note points out that interim counsel must represent the class's best interests, particularly in connection with pre-certification efforts to settle the action. If a settlement is proposed, class members must be notified in a reasonable manner of the terms, which may involve individual notices. Another amendment, to Rule 23(c), requires that the certification notice, which often includes notice of a proposed settlement, must be concise, clear, and in "plain, easily understood language." The Advisory Committee on Civil Rules worked with the Federal Judicial Center on developing model clear-notice forms, which can be found at the Center's web site <www.fjc.gov>. To enable the court to fully understand the terms of a settlement, the rule was amended to require that any "side agreements" made in connection with the settlement must be identified. Side agreements can be important to understand the terms parties and counsel have agreed to, but sometimes fail to disclose to the court. Some side agreements may influence the terms of settlement by trading away possible advantages for some members of the class in return for advantages for other class members.

The amended rule also provides guidance on handling objections, which has proven a difficult part of class action practice. Any class member may object to a proposed settlement.

Once a class member has objected to the fairness of the settlement, the member may not withdraw that objection without the court's approval, allowing the court to review any agreements made by the objectors with the parties and counsel.

Class members in a Rule 23(b)(3) action (class actions primarily involving money damages) have always been given an opportunity to opt out of a class action at the time the class action is certified. But when a class action has been certified before a settlement has been reached, the decision whether to opt out is often made well before the nature and scope of liability and damages are understood. In many of these class actions, a member has no opportunity to reject a settlement after the initial opportunity to opt out of the class has expired (when, for example, the member becomes aware for the first time that only coupons or small awards are being offered). A great many changes in class members' circumstances and other aspects of the litigation may have occurred after certification but before the terms of the settlement were sent to the class members.

Amended Rule 23(e) authorizes a court to refuse to approve a settlement unless the settlement affords class members a new opportunity to be excluded from the class action at a time when class members can make an informed decision based on the actual proposed settlement terms. The second opt-out opportunity introduces a measure of class-member control that is consistent with traditional litigation. At a basic level, the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits. It provides added assurances that the settlement terms are fair by giving class members an opportunity to examine them and decide for themselves whether to accept them. The number of opt-outs also sets up a good check on the fairness of the settlement and can alert the reviewing court of a possible unfair settlement when the number of rejections is high.

ATTORNEY FEE AWARDS

Courts are responsible for approving requests for attorney fee awards in class action settlements. Before the 2003 amendments, Rule 23 was not especially helpful in setting out procedures that would provide judges with information adequate to discharge their responsibilities. The attorney fee provisions in new Rule 23(h) provide the needed guidance. They contain five main features dealing with: scope; procedure governing the fee motion; factors to be considered in awarding reasonable fees; objections to the fee request; and court findings and award of fees.

New Rule 23(g) and (h) set up guideposts for judges in appointing class counsel and setting attorney fee awards in class actions. The amended rule emphasizes counsel's duty to represent the class's interests and the court's duty to attend to the relationship between the fee award and the actual value of the benefit in fact received by class members. Rule 23(g) authorizes the court to include fee provisions in the order appointing class counsel. Rule 23(h) for the first time sets out the specific criterion that an attorney fee request be "reasonable." Greater detail in the governing standard was eschewed to permit flexibility to handle the immense range of class actions, which span minuscule individual consumer claims, small to large commercial claims in such areas as antitrust law, and enormous individual mass tort claims. Prescribing detailed rigid standards governing attorney fees in all class actions would also be counterproductive, because it would stifle the continued development of case law in this area. The Committee Notes set out the

analytical framework for fee-award determinations, recognizing that the case law will continue to develop and that subtle variations from circuit to circuit will contribute to better understanding of the nuances these issues can present.

The Committee Notes provide extensive guidance on the "best practices" used by courts in setting fee awards, including details on the factors that courts have recently, and consistently, found important when considering whether the fees sought are justified and "reasonable." The Notes emphasize the importance of the reviewing court's focus on realistically assessing the value of what class members actually receive in the settlement in setting the fee award for class counsel. The Notes suggest that in some cases a court should delay setting the fee award until the benefits class members actually receive in the settlement have become clear. The Notes also suggest that in some cases, the court should consider fees paid counsel by individual class members in accordance with retainer agreements.

Rule 23(h) works in tandem with new Rule 23(g), which requires the court to select and appoint class counsel. Prior to the 2003 amendment, Rule 23 did not address the selection or responsibilities of class counsel. The adequacy of counsel had been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives would fairly and adequately protect the interests of the class. Amended Rule 23(g)(1)(A) explicitly recognizes the requirement that the court must appoint class counsel for each certified class, unless a statute such as the Private Securities Litigation Reform Act establishes different requirements. The amended rule provides a court with the opportunity to seize control of the class counsel designation at the outset of litigation. Specifically, a court may include provisions on the award of attorney fees as part of its order appointing counsel. By doing so the court can exercise better control over the expenses throughout the litigation. For example, the court may require that class counsel provide interim fee reports as the case progresses. These periodic reports may require counsel to set up specific record keeping of time and costs incurred in the representation.

Amended Rule 23(g)(1)(B) states that class counsel "must fairly and adequately represent the interests of the class." Under the amended rule, a court may direct potential class counsel to provide additional information to assist it in making the appointment decision, including the express proposed terms of an attorney fee award. When there are multiple applicants, this authority will be a particularly effective safeguard, encouraging counsel and the court to reach an early shared understanding about the basis on which fees will be sought. The provision has been used by judges to emphasize the importance of judicial control over attorney fee awards. This feature of the amended rule may forestall later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award requests that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

To further ensure the fairness of the fee award, new Rule 23(h) requires that class members be notified of an attorney fee motion by class counsel and be given an opportunity to object to it. If anyone objects, the court may authorize the objector to investigate the proposed fee award through discovery — although broad discovery is not ordinarily appropriate in regard to fee

motions because it may lead to abuse. The amendments also require a court to make findings supporting its fee award, holding a hearing if appropriate.

CONCLUSIONS

The amendments to Rule 23 that took effect in December 2003 represent the collaborative product of a comprehensive rulemaking process that relied on extensive input from experienced judges, plaintiff and defense lawyers, corporate counsel, public interest lawyers, government lawyers, and leading law professors. The amendments were intended in many respects to codify and amplify the "best practices" that courts had developed effectively and fairly to supervise class action litigation. The amendments reflect the judiciary's current best judgment on the standards to be used in awarding attorney fees and evaluating the fairness of settlements in class actions. The Judicial Conference took action to implement these best practices by approving the amendments to Rule 23 and transmitting them to the Supreme Court, where they were ultimately prescribed and took effect in December 2003.

The 2003 Rule 23 amendments establish a framework within which best practices will continue to evolve. Case law has already emerged applying the 2003 amendments. Developing practices will be studied by the Rules Committees, carrying forward the duty to study the Civil Rules. The empirical research services of the Federal Judicial Center may be enlisted to monitor developing practices and as appropriate to include them in revisions to the *Manual for Complex Litigation* and other Federal Judicial Center publications intended to provide continuing education for judges. Further amendments to Rule 23 itself will be considered if new problems arise, or if evolving practice suggests that best practices would be advanced by new rule provisions.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

1 **(c) Determin~~ation~~ing by Order Whether to Certify a**
2 **Class Action ~~to Be Maintained~~; Appointing Class**
3 **Counsel; Notice and Membership in Class; Judgment;**
4 **~~Actions Conducted Partially as Class Actions~~ Multiple**
5 **Classes and Subclasses.**

6 **(1) (A)** ~~As soon as practicable after the commencement~~
7 ~~of an action brought as a class action, the court~~
8 ~~shall determine by order whether it is to be so~~

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*New material is underlined; matter to be omitted is lined through.

9 ~~maintained.~~ When a person sues or is sued as
10 a representative of a class, the court must —
11 at an early practicable time — determine by
12 order whether to certify the action as a class
13 action.

14 (B) An order certifying a class action must define
15 the class and the class claims, issues, or defenses,
16 and must appoint class counsel under Rule 23(g).

17 (C) An order under ~~this subdivision~~ Rule 23(c)(1)
18 ~~may be conditional, and~~ may be altered or amended
19 before ~~the decision on the merits~~ final judgment.

20 (2) (A) For any class certified under Rule 23(b)(1) or
21 (2), the court may direct appropriate notice to the
22 class.

23 **(B)** For ~~In~~ any class ~~action maintained~~ certified
24 under ~~subdivision~~ Rule 23(b)(3), the court ~~shall~~
25 must direct to class ~~the~~ members ~~of the class~~ the
26 best notice practicable under the circumstances,
27 including individual notice to all members who can
28 be identified through reasonable effort. The notice
29 must concisely and clearly state in plain, easily
30 understood language:

31 • the nature of the action,
32 • the definition of the class certified,
33 • the class claims, issues, or defenses,
34 • that a class member may enter an
35 appearance through counsel if the member
36 so desires,

37 • that the court will exclude from the class
38 any member who requests exclusion,
39 stating when and how members may elect
40 to be excluded, and

41 • the binding effect of a class judgment on
42 class members under Rule 23(c)(3).

43 ~~(ii) For any class certified under Rule 23 (b)(1)~~
44 ~~or (2), the court must direct notice by means~~
45 ~~calculated to reach a reasonable number of~~
46 ~~class members.~~

47 ~~(iii) In any class action maintained under~~
48 ~~subdivision (b)(3), the court shall direct to the~~
49 ~~members of the class the best notice practicable~~
50 ~~under the circumstances, including individual~~
51 ~~notice to all members who can be identified~~

52 ~~through reasonable effort. The notice shall~~
53 ~~advise each member that (A) the court will~~
54 ~~exclude the member from the class if the~~
55 ~~member so requests by a specified date; (B) the~~
56 ~~judgment, whether favorable or not, will~~
57 ~~include all members who do not request~~
58 ~~exclusion; and (C) any member who does not~~
59 ~~request exclusion may, if the member desires,~~
60 ~~enter an appearance through counsel.~~

61 **(3)** The judgment in an action maintained as a class
62 action under subdivision (b)(1) or (b)(2), whether or not
63 favorable to the class, shall include and describe those
64 whom the court finds to be members of the class. The
65 judgment in an action maintained as a class action under
66 subdivision (b)(3), whether or not favorable to the class,
67 shall include and specify or describe those to whom the

68 notice provided in subdivision (c)(2) was directed, and
69 who have not requested exclusion, and whom the court
70 finds to be members of the class.

71 **(4)** When appropriate (A) an action may be brought or
72 maintained as a class action with respect to particular
73 issues, or (B) a class may be divided into subclasses and
74 each subclass treated as a class, and the provisions of this
75 rule shall then be construed and applied accordingly.

76 * * * * *

77 **(e) Settlement, Voluntary Dismissal, or Compromise.** ~~A~~
78 ~~class action shall not be dismissed or compromised without~~
79 ~~the approval of the court, and notice of the proposed dismissal~~
80 ~~or compromise shall be given to all members of the class in~~
81 ~~such manner as the court directs.~~

82 (1) (A) The court must approve any settlement,
83 voluntary dismissal, or compromise of the claims,
84 issues, or defenses of a certified class.

85 (B) The court must direct notice in a reasonable
86 manner to all class members who would be bound
87 by a proposed settlement, voluntary dismissal, or
88 compromise.

89 (C) The court may approve a settlement, voluntary
90 dismissal, or compromise that would bind class
91 members only after a hearing and on finding that the
92 settlement, voluntary dismissal, or compromise is
93 fair, reasonable, and adequate.

94 (2) The parties seeking approval of a settlement,
95 voluntary dismissal, or compromise under Rule 23(e)(1)
96 must file a statement identifying any agreement made in

97 connection with the proposed settlement, voluntary
98 dismissal, or compromise.

99 (3) In an action previously certified as a class action
100 under Rule 23(b)(3), the court may refuse to approve a
101 settlement unless it affords a new opportunity to request
102 exclusion to individual class members who had an earlier
103 opportunity to request exclusion but did not do so.

104 (4) (A) Any class member may object to a proposed
105 settlement, voluntary dismissal, or compromise that
106 requires court approval under Rule 23(e)(1)(A).

107 (B) An objection made under Rule 23(e)(4)(A)
108 may be withdrawn only with the court's approval.

109 * * * * *

110 **(g) Class Counsel.**

111 **(1) Appointing Class Counsel.**

112 (A) Unless a statute provides otherwise, a court that
113 certifies a class must appoint class counsel.

114 (B) An attorney appointed to serve as class counsel
115 must fairly and adequately represent the interests of
116 the class.

117 (C) In appointing class counsel, the court

118 (i) must consider:

119 • the work counsel has done in identifying
120 or investigating potential claims in the
121 action ,

122 • counsel's experience in handling class
123 actions, other complex litigation, and
124 claims of the type asserted in the action,

125 • counsel's knowledge of the applicable
126 law, and

127 • the resources counsel will commit to
128 representing the class;

129 (ii) may consider any other matter pertinent to
130 counsel's ability to fairly and adequately
131 represent the interests of the class;

132 (iii) may direct potential class counsel to
133 provide information on any subject pertinent to
134 the appointment and to propose terms for
135 attorney fees and nontaxable costs; and

136 (iv) may make further orders in connection
137 with the appointment.

138 **(2) Appointment Procedure.**

139 (A) The court may designate interim counsel to act
140 on behalf of the putative class before determining
141 whether to certify the action as a class action.

142 **(B)** When there is one applicant for appointment as
143 class counsel, the court may appoint that applicant
144 only if the applicant is adequate under Rule
145 23(g)(1)(B) and (C). If more than one adequate
146 applicant seeks appointment as class counsel, the
147 court must appoint the applicant best able to
148 represent the interests of the class.

149 **(C)** The order appointing class counsel may include
150 provisions about the award of attorney fees or
151 nontaxable costs under Rule 23(h).

152 **(h) Attorney Fees Award.** In an action certified as a class
153 action, the court may award reasonable attorney fees and
154 nontaxable costs authorized by law or by agreement of the
155 parties as follows:

156 **(1) Motion for Award of Attorney Fees.** A claim for
157 an award of attorney fees and nontaxable costs must be
158 made by motion under Rule 54(d)(2), subject to the
159 provisions of this subdivision, at a time set by the court.
160 Notice of the motion must be served on all parties and,
161 for motions by class counsel, directed to class members
162 in a reasonable manner.

163 **(2) Objections to Motion.** A class member, or a party
164 from whom payment is sought, may object to the motion.

165 **(3) Hearing and Findings.** The court may hold a
166 hearing and must find the facts and state its conclusions
167 of law on the motion under Rule 52(a).

168 **(4) Reference to Special Master or Magistrate Judge.**
169 The court may refer issues related to the amount of the

170 award to a special master or to a magistrate judge as

171 provided in Rule 54(d)(2)(D).

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification

determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment

concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single

notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take

advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes,

including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that

should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an

attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards,

under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is

worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated

to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the

motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

3-B

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Rules Committee Support Office

May 26, 2006

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its support service to the rules committees.

Rules Committees' Records

Last summer, we began an ambitious project to locate, retrieve, scan, and archive rules committees' records prior to 1992. (We had already retrieved and posted to the judiciary's Federal Rulemaking internet website all advisory rules committees' reports to the Standing Committee and Standing Committee's reports to the Judicial Conference from 1992/3 to present. We had also collected and posted to the website all rules committees' minutes dating back to 1992.) We recently completed the project and now have posted on the website all available rules committees' minutes and reports contained on microfiche from 1935-present. *See* <http://www.uscourts.gov/rules/newrules7.html>. These primary rules records allow users to conduct comprehensive research on the "legislative history" of rules amendments. We are currently working with a number of law libraries to locate missing committee minutes and reports, which we will add to our collection and post on the website.

This summer, we will start work on another major project to locate, scan, and archive all comments submitted prior to 2004 on rules amendments published for comment. (We recently posted all 515 comments submitted on Appellate Rule 32.1. *See* <http://www.uscourts.gov/rules/proposed0803.htm>.)

Federal Rulemaking Website

We received, acknowledged, forwarded, and followed up on 76 comments submitted on the proposed amendments published for comment in August 2005. Continuing a practice we began last year, we posted to the website all comments received on the proposed rules amendments. The web page containing the comments was well used, receiving over 11,500 "visits" during the six-month public comment period.

Committee and Subcommittee Meetings

For the period from December 9, 2005, to May 26, 2006, the office staffed seven meetings, including one Standing Committee meeting, five advisory rules committee meetings, and a meeting of the informal working group on mass torts. The office also staffed a mini-conference on the law of privileges. We also arranged and participated in numerous conference calls involving rules subcommittees.

The docket sheets of all suggested amendments for Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the rules committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are posted on the rules website. (We are currently working on retrieving, scanning, and posting to the website all available suggestions for rules amendments.)

The office staff continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. Pertinent documents are forwarded to the appropriate reporter for consideration.

Automation Projects

Documentum continues to work very well. We are using Documentum to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products. We hope to add an enhancement to the system soon that will allow remote access to the database by committee members, reporters, and staff.

Miscellaneous

On April 12, 2006, the Supreme Court approved proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and Federal Rules of Evidence, which were approved by the Judicial Conference at its March and September 2005 sessions. We delivered copies of the package to William K. Suter, Clerk of the Supreme Court, for transmission to Congress.

In April 2006, the Foreign Intelligence Surveillance Court (FISC) proposed new procedures for reviewing petitions filed under Section 501(f) of the Foreign Intelligence Surveillance Act. We reviewed and commented on the draft procedures and assisted the court by posting the proposed procedures on the rules website. The draft procedures were approved on May 5, 2006, and posted on the website.

James N. Ishida

Attachments

CIVIL RULES SUGGESTIONS DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CIVIL RULES	
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 5 Permit service by Federal Express or other overnight carrier	05-CV-I Time Project Subcommittee of the Standing Rules Committee (Prof. Patrick J. Schiltz, Lead Reporter) 11/23/05	11/05 - Received by reporter and chair **PENDING FURTHER ACTION**
Rule 5(e) Mandatory electronic filing should be encouraged to the fullest extent possible	04-CV-G Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and deferred action 1/05 - Standing Committee approved 3/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 7.1(a) Simplify filing by modifying CM/ECF to accommodate filing of supplemental statement	04-CV-I Lawrence K. Baerman, Clerk 11/29/04	12/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(c) In restyling the civil rules: delete "discharge in bankruptcy"; and insert "claim preclusion" and "issue preclusion"	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair 10/05 – Committee considered and agreed in principle 1/06 - Standing Committee approved and deferred publication pending submission of other proposals to be published **PENDING FURTHER ACTION**
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee=s report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee 5/06 - Committee considered subcommittee report **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair 5/06 - Committee considered subcommittee report **PENDING FURTHER ACTION**
Rule 26(a)(2)(B) To clarify that all testifying expert witnesses are subject to the same disclosure requirements	05-CV-C George Brent Mickum IV, Esq. 5/25/05	6/05 - Referred to reporter and chair 10/05 - Committee considered 5/06 - Committee considered subcommittee report **PENDING FURTHER ACTION**
Rule 45 Personal service of a subpoena need not be the only method of service under this rule	05-CV-H New York State Bar Association Committee on Federal Procedure Gregory K. Arenson, Chair 11/17/05	11/05 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 48 Polling the Jury	Standing Committee	10/05 - Committee considered and approved in principle 5/06 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered 4/05 - Committee reviewed 10/05 - Committee considered 5/06 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and ' 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. ' 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 68 Permit plaintiffs and defendants to make offers of compromise	04-CV-H Judge Christina A. Snyder 7/23/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 68 Address the practice of "high-low" settlement agreements	04-CV-J Judge Paul D. Borman 12/21/04	12/04 - Received by chair **PENDING FURTHER ACTION**
Rule 68 No compelling request for party witnesses located out-of-state and outside 100 miles to appear at trial	05-CV-G New York State Bar Association Committee on Federal Procedure (Gregory K. Arenson, Chair; Thomas McGanney; Allan M. Pepper)	10/05 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
	FORMS	
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant 8/05 - Illustrative Civil Forms published for public comment 5/06 - Committee approved restyled forms **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
	SUBJECT MATTER	
New Admiralty Rule G Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Electronic Acknowledgment Send acknowledgment of service electronically in a fillable, saveable PDF form	06-CV-B Public Citizen Litigation Group (Paul Alan Levy) 3/17/06	3/06 - Referred to reporter and chair **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication

Suggestion	Docket Number, Source, and Date	Status
		restyle Civil Rules 38-63 6/04 - Standing Committee approved for publication 1/05 - Standing Committee approved for publication 2/05 - Published for public comment 5/06 - Committee approved **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Time Computation Project	06-CV-A 5(b) Authorize service by third-party commercial carriers (e.g., Federal Express, etc.) 1/6/06	1/06 - Committee considered 5/06 - Committee indicated approval, with slight modifications **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 4 Require that foreign citizens be advised of their right to contact the consulate of their country	05-CR-A Professor Linda A. Malone 3/3/05, 3/25/05	3/05 - Referred to chair and reporter 4/05 - Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 5 Require that foreign citizens be advised of their right to contact the consulate of their country	05-CR-A Professor Linda A. Malone 3/3/05, 3/25/05	3/05 - Referred to chair and reporter 4/05 - Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 7 Update the rules related to forfeiture proceedings first promulgated in 2000	06-CR-C U.S. Department of Justice (Benton J. Campbell, Acting Counselor to the Assistant Attorney General) 1/3/06	1/06 - Referred to chair and reporter 4/06 - Committee considered **PENDING FURTHER ACTION**
Rule 10 Permit the waiver of arraignment	05-CR-C Judge James F. McClure, Jr. 12/14/04	12/04 - Received by Judge Bartle and referred to chair 4/05 Committee considered 10/05 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12(b) Remove an anomaly that allows defendants to belatedly challenge the facial validity of an indictment or information during or after trail	06-CR-B U.S. Department of Justice (Benton J. Campbell, Acting Counselor to the Assistant Attorney General) 1/3/06	1/06 - Referred to chair and reporter 4/06 - Committee considered and deferred to next meeting **PENDING FURTHER ACTION**
Rule 32 Require a party providing information to the court regarding a sentencing proceeding to provide that information to the other party	05-CR-B James E. Felman, Esq. 2/1/05	2/05 - Received by chair 4/05 - Committee considered and postponed action **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 32.2 Update the rules related to forfeiture proceedings first promulgated in 2000	06-CR-C U.S. Department of Justice (Benton J. Campbell, Acting Counselor to the Assistant Attorney General) 1/3/06	1/06 - Referred to chair and reporter 4/06 - Committee considered and deferred to next meeting **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 41(b) Permit magistrates to issue warrants for property within the jurisdiction of the U.S., but outside of any judicial district	06-CR-D U.S. Department of Justice (Benton J. Campbell, Acting Counselor to the Assistant Attorney General) 1/3/06	1/06 - Referred to chair and reporter 4/06 - Committee considered and approved for publication **PENDING FURTHER ACTION**
	SUBJECT MATTER	
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition*. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Antiterrorism and Effective Death Penalty Act of 1996 Amend Criminal Rules and Rules Governing §§ 2254 and 2255 Proceedings that are inconsistent with the collateral review provisions in the Act	06-CR-A U.S. Department of Justice (Benton J. Campbell, Acting Counselor to the Assistant Attorney General) 1/3/06	1/06 - Referred to chair and reporter 4/06 - Committee considered and deferred to next meeting. Subcommittee appointed to consider proposal **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Crime Victims' Rights Act Proposing 25 changes throughout the rules, including two new rules	05-CR-D Judge Paul G. Cassell 3/2/05	3/05 - Received by chair 4/05 - Committee received 4/05 - Subcommittee on Victims Rights' Act appointment 10/05 - Committee approved subcommittee's recommendations and approved in principle for publication proposed amendments to Criminal Rules 1, 12.1, 17, 32, and new rule 43.1 action 1/06 - Standing Committee approved for publication 4/06 - Committee considered comments and withdrew proposal to amend R 32(k) in light of *USA Patriot Improvement and Reauthorization Act of 2005* **PENDING FURTHER ACTION**
Gonzalez v. Crosby 125 S. Ct. 2641 (2005) Discuss impact of increase in prisoner petitions	05-CR-F Judge Michael M. Baylson 11/2/05	11/05 - Received by Civil Rules chair & forwarded to Criminal Rules chair and reporter **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET (Pending Suggestions Only)

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	EVIDENCE RULES	
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 404(a) Prohibit the circumstantial use of character evidence in civil cases		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey 4/04 - Committee considered survey 4/05 - Committee considered survey 11/05 - Committee considered 4/06 - Committee held mini-conference on proposed privilege waiver rule and approved for publication proposed new Evidence Rule 502 **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved 6/05 - Standing Committee approved 9/05 - Judicial Conference approved 4/06 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
	SUBJECT MATTER	
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered 11/05 - Committee considered and approved in principle a new Evidence Rule, which would accommodate electronic evidence **PENDING FURTHER ACTION**
[Medical Billing System] — Simplify the system	04-EV-A John D. Gleissner, Esquire 1/26/05	1/05 - Referred to chair and reporter **PENDING FURTHER ACTION**

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REPORT OF THE FEDERAL JUDICIAL CENTER

(Oral Report)

5-A

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Memorandum To: Standing Committee on Rules of Practice and Procedure
From: Dan Capra, Reporter to Technology Subcommittee
Re: Amendments Implementing Directives of the E-Government Act of 2002
Date: May 31, 2006

The Standing Committee's Subcommittee on Technology has worked with the Advisory Committees to prepare rules that comply with the directives of the E-Government Act of 2002. That Act states that the Supreme Court shall prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The Act requires, among other things, that the rules to be enacted "shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the federal courts."

History

The proposed rules attached to this memorandum are drawn from Judicial Conference policy on the redaction of certain personal information from court filings. The Conference policy resulted from significant work done by the Committee of Court Administration and Case Management (CACM), with input from the Rules Committee. CACM's work, and the Judicial Conference policy, responded to a problem created by the fact that court filings are available on the internet. Internet access to court filings by non-parties raises the risk that private information in those filings can be obtained with relative ease — unlike the "practical obscurity" of such information if it could be obtained only at the courthouse. With ease of access comes potential misuse of the information by members of the public.

CACM recognized that internet access to court filings created a risk of abuse, but also recognized the basic importance of public access to court filings. CACM recommended, as a general principle, that whatever information could be accessed at the courthouse should also be accessible online – the so-called "public is public" principle. But an important proviso in the CACM/Judicial Conference Policy is that a person making a filing has the obligation to redact certain private information that is especially subject to misuse.

The Basic Rule

The Civil, Criminal, and Bankruptcy Rules implementing the E-Government Act and Judicial Conference policy establish a redaction requirement for certain kinds of private information. Exceptions are provided for filings as to which the redaction requirement would either be extremely burdensome (e.g., a pre-existing administrative or court record that was not subject to the redaction requirement when made), or for some other well-substantiated reason (e.g., that the information is already widely public). Further provisions are made: 1) for the possibility of a protective order for greater protection than provided by the redaction requirement; 2) for the possibility of sealing a court filing; 3) for an option for filing an additional, unredacted copy under seal (this provision is mandated by the E-Government Act); 4) for an option for filing a reference list (also mandated by the E-Government Act); 5) for the possibility that a filer may wish to waive the protections of the redaction requirement.

Uniformity

The E-Government Act requires the privacy rules to be as uniform as practicable. Extraordinary efforts were made to comply with this directive. There are two major disuniformities to draw to the Standing Committee's attention:

First, CACM (and the Judicial Conference) provided special treatment for Social Security cases, due to the volume of filings and the prevalence of private information in those filings. Non-parties are not given remote access to these filings. Early in the rulemaking process, DOJ made a showing that immigration cases present analogous concerns, of high-volume filings containing a large amount of personal information. Consequently, the Civil Rules Committee decided to accord immigration cases the same treatment as social security cases. Thus, Civil Rule 5.2 contains a provision not found in the other rules, providing for special treatment of social security and immigration cases.

Second, it was decided early in the process that the Appellate Rule should provide for "dynamic conformity." That is, the basic appellate rule is: whatever redaction requirement applied to the case below will apply to the case on appeal. Thus, the Appellate Rule is for good reason not uniform with the other rules. Rather, it essentially adopts those rules depending on where the case began.

There are other specific situations in which the Civil, Criminal and Bankruptcy Rules are not uniform. But in each case the disuniformity is justified by some factor particular to the respective set of rules — for example, Bankruptcy uses the term "entity" instead of "person" because the term "person" has a different meaning under the Bankruptcy Code and Rules that would make its use inappropriate. The comparison chart attached to this memo provides a short explanation for each

instance in which the three sets of rules are not uniform.[1]

Public Comment

It should be noted that the public comment on the rules was largely positive. The only major change resulting from the public comment was to clarify that the redaction requirement falls on the filer, and not on the clerk or the court. This change was suggested by the Magistrate Judges. Finally, significant improvements to the rules were made by the Style Subcommittee of the Standing Committee.

Attachments

The following materials are submitted for the consideration of the Standing Committee:

1. A comparison chart setting forth the text of the Civil, Criminal and Bankruptcy Rules, with a fourth column intended to explain any differences among the rules.

2. The proposed Civil Rule 5.2 and Committee Note.

3. The proposed Criminal Rule 49.1 and Committee Note.

4. The proposed Bankruptcy Rule 9037 and Committee Note.

5. The proposed Appellate Rule 25(a)(5) and Committee Note.

The respective GAP reports and summaries of public comments can be found in each Committee's submission to the Standing Committee.

It should be noted that with the exception of the Appellate Rule, the final versions of the rules included in this memo may differ in some minor respects from the versions included in the materials from the respective committees. This is because a number of style suggestions were implemented

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[1] One minor exception to complete uniformity is Bankruptcy subdivision (b)(3). The exemption for state court proceedings was originally thought not necessary in bankruptcy cases, as the provision was designed primarily to cover state cases removed to the federal court. After all the Advisory Committees met, the Reporters conducted a thorough review for uniformity and it was determined that state court records are sometimes filed in bankruptcy proceedings, and so the subdivision should be added. The proposed addition was tentatively approved by the Bankruptcy Chair and Reporter, and sent for an email vote to the members of the Bankruptcy Committee.

after the Committees submitted their materials. These style suggestions were approved by the Reporters and Chairs of the respective Committees. The rules attached to this memo are the final product from each Advisory Committee.

Rule 5.2. Privacy Protection For Filings Made with the Court	Rule 49.1 Privacy Protection For Filings Made with the Court	Rule 9037. Privacy Protection For Filings Made with the Court	Explanation of Differences
(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1)the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.	**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; (4) the last four digits of the financial-account number; and (5) the city and state of the home address.	**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number.	Bankruptcy requires disclosure of the full name of a debtor, even if a minor, and also adds "identified as" a minor because of the burdens of determining whether a particular creditor is a minor.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following: (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by Rule 5.2(c) or (d); and (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.	**(b) Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following: (1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding; (2) the record of an administrative or agency proceeding; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by Rule 49.1(d); (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255; (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case; (8) an arrest or search warrant; and (9) a charging document and an affidavit filed in support of any charging document.	**(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT.** The redaction requirement does not apply to the following: (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding. (2) the record of an administrative or agency proceeding unless filed with a proof of claim; (3) the official record of a state-court proceeding; (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; (5) a filing covered by subdivision (c) of this rule; and (6) a filing that is subject to § 110 of the Code.	Criminal refers to real property address because addresses are subject to the criminal rule redaction requirement. Bankruptcy needs to accommodate proof of claim Bankruptcy has tentatively approved subdivision(3) at the time this chart is submitted. Different style for internal references in the respective rules. Criminal requires more redaction exceptions per showing by DOJ on these matters.

(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or a proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows: (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to: (A) the docket maintained by the court; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.	**(c) Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.		Special treatment for social security and immigration cases.

62 63 64 65 66 67 68 69	**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.	**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.	**(c) FILINGS MADE UNDER SEAL.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.	Bankruptcy uses "entity" instead of person because §101(41) and Rule 9001 include a more restrictive definition of "person" than the other rules anticipate. In the Bankruptcy Rules, "entity" includes "person."
70 71 72 73 74 75 76 77	**(e) Protective Orders.** For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.	**(e) Protective Orders.** For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.	**(d) PROTECTIVE ORDERS.** For cause, the court may by order in a case under the Code: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.	Bankruptcy refers to the Code
78 79 80 81 82 83 84	**(f) Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.	**(f) Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.	**(e) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL.** An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.	Bankruptcy uses "entity" instead of person because §101(41) and Rule 9001 include a more restrictive definition of "person" than the other rules anticipate. In the Bankruptcy Rules, "entity" includes "person."

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.	**(g) Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.	**(f) OPTION FOR FILING A REFERENCE LIST.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.	
(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.	**(h) Waiver of Protection of Identifiers.** A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.	**(g) WAIVER OF PROTECTION OF IDENTIFIERS.** An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.	Different style conventions for internal references in Bankruptcy Rules. On use of "entity" rather than "person" in Bankruptcy, see above.

5-B

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 (5) **Privacy Protection.** An appeal in a case whose
4 privacy protection was governed by Federal Rule of
5 Bankruptcy Procedure 9037, Federal Rule of Civil
6 Procedure 5.2, or Federal Rule of Criminal
7 Procedure 49.1 is governed by the same rule on
8 appeal. In all other proceedings, privacy protection
9 is governed by Federal Rule of Civil Procedure 5.2,
10 except that Federal Rule of Criminal Procedure 49.1
11 governs when an extraordinary writ is sought in a
12 criminal case.

13 * * * * *

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* New material is underlined; matter to be omitted is lined through.

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

Rule 9037. Privacy Protection For Filings Made with the Court

1 (a) REDACTED FILINGS. Unless the court orders
2 otherwise, in an electronic or paper filing made with the court
3 that contains an individual's social-security number, taxpayer-
4 identification number, or birth date, the name of an
5 individual, other than the debtor, known to be and identified
6 as a minor, or a financial-account number, a party or
7 nonparty making the filing may include only:
8 (1) the last four digits of the social-security number and
9 taxpayer-identification number;
10 (2) the year of the individual's birth;
11 (3) the minor's initials; and
12 (4) the last four digits of the financial-account number.
13 (b) EXEMPTIONS FROM THE REDACTION
14 REQUIREMENT. The redaction requirement does not apply
15 to the following:
16 (1) a financial-account number that identifies the

17 property allegedly subject to forfeiture in a forfeiture
18 proceeding
19 (2) the record of an administrative or agency
20 proceeding unless filed with a proof of claim;
21 [(3) the official record of a state-court proceeding;]
22 (4) the record of a court or tribunal, if that record
23 was not subject to the redaction requirement when originally
24 filed;
25 (5) a filing covered by subdivision (c) of this rule;
26 and
27 (6) a filing that is subject to § 110 of the Code.
28 (c) FILINGS MADE UNDER SEAL. The court may
29 order that a filing be made under seal without redaction. The
30 court may later unseal the filing or order the entity that made
31 the filing to file a redacted version for the public record.
32 (d) PROTECTIVE ORDERS. For cause, the court may
33 by order in a case under the Code:
34 (1) require redaction of additional information; or

35 (2) limit or prohibit a nonparty's remote electronic
36 access to a document filed with the court.
37 (e) OPTION FOR ADDITIONAL UNREDACTED
38 FILING UNDER SEAL. An entity making a redacted filing
39 may also file an unredacted copy under seal. The court must
40 retain the unredacted copy as part of the record.
41 (f) OPTION FOR FILING A REFERENCE LIST. A
42 filing that contains redacted information may be filed together
43 with a reference list that identifies each item of redacted
44 information and specifies an appropriate identifier that
45 uniquely corresponds to each item listed. The list must be
46 filed under seal and may be amended as of right. Any
47 reference in the case to a listed identifier will be construed to
48 refer to the corresponding item of information.
49 (g) WAIVER OF PROTECTION OF IDENTIFIERS. An
50 entity waives the protection of subdivision (a) as to the
51 entity's own information by filing it without redaction and not
52 under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form, but the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social-security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (c) or (d). Moreover, the rule does not

affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority.

Any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should therefore notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

A debtor's full social-security number is included on the notice of the § 341 meeting of creditors sent to creditors. Of course, that is not filed with the court, see Rule 1007(f) (the debtor "submits" this information), and the copy of the notice that is filed with the court does not include the full social-security number. Thus, since the full social-security number is not filed with the court, it is not available to a person searching that record.

The clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court.

Subdivision (d) recognizes the court's inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the rule. These orders may be issued whenever necessary either by the court on its own motion, or on motion of a party in interest.

Subdivision (e) allows an entity that makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (f) allows the option to file a reference list of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government

Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (g) allows an entity to waive the protections of the rule as to that entity's own information by filing it in unredacted form. An entity may elect to waive the protection if, for example, it is determined that the costs of redaction outweigh the benefits to privacy. As to financial account numbers, the instructions to Schedules E and F of Official Form 6 note that the debtor may elect to include the complete account number on those schedules rather than limit the number to the final four digits. Including the complete number would operate as a waiver by the debtor under subdivision (g) as to the full information that the debtor set out on those schedules. The waiver operates only to the extent of the information that the entity filed without redaction. If an entity files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 9037 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with this rule if and when they are filed as part of an appeal or for other reasons.

1 **Rule 5.2. Privacy Protection For Filings Made with the**
2 **Court**
3 **(a) Redacted Filings.** Unless the court orders otherwise, in
4 an electronic or paper filing with the court that
5 contains an individual's social-security number,
6 taxpayer-identification number, or birth date, the
7 name of an individual known to be a minor, or a
8 financial-account number, a party or nonparty making
9 the filing may include only:
10 (1) the last four digits of the social-security number
11 and taxpayer-identification number;
12 (2) the year of the individual's birth;
13 (3) the minor's initials; and
14 (4) the last four digits of the financial-account
15 number.

16 **(b) Exemptions from the Redaction Requirement.** The
17 redaction requirement does not apply to the following:
18 (1) a financial-account number that identifies the
19 property allegedly subject to forfeiture in a
20 forfeiture proceeding;
21 (2) the record of an administrative or agency
22 proceeding;
23 (3) the official record of a state-court proceeding;
24 (4) the record of a court or tribunal, if that record was
25 not subject to the redaction requirement when
26 originally filed;
27 (5) a filing covered by Rule 5.2(c) or (d); and
28 (6) a pro se filing in an action brought under 28
29 U.S.C. §§ 2241, 2254, or 2255.
30 **(c) Limitations on Remote Access to Electronic Files;**
31 **Social-Security Appeals and Immigration Cases.**

32 Unless the court orders otherwise, in an action for
33 benefits under the Social Security Act, and in an
34 action or proceeding relating to an order of removal,
35 relief from removal, or immigration benefits or
36 detention, access to an electronic file is authorized as
37 follows:
38 (1) the parties and their attorneys may have remote
39 electronic access to any part of the case file,
40 including the administrative record;
41 (2) any other person may have electronic access to the
42 full record at the courthouse, but may have
43 remote electronic access only to:
44 (A) the docket maintained by the court; and
45 (B) an opinion, order, judgment, or other
46 disposition of the court, but not any

47 other part of the case file or the
48 administrative record.
49 **(d) Filings Made Under Seal.** The court may order that a
50 filing be made under seal without redaction. The
51 court may later unseal the filing or order the person
52 who made the filing to file a redacted version for the
53 public record.
54 **(e) Protective Orders.** For good cause, the court may by
55 order in a case:
56 (1) require redaction of additional information; or
57 (2) limit or prohibit a nonparty's remote electronic
58 access to a document filed with the court.
59 **(f) Option for Additional Unredacted Filing Under Seal.**
60 A person making a redacted filing may also file an
61 unredacted copy under seal. The court must retain the
62 unredacted copy as part of the record.

63 **(g) Option for Filing a Reference List.** A filing that
64 contains redacted information may be filed together
65 with a reference list that identifies each item of
66 redacted information and specifies an appropriate
67 identifier that uniquely corresponds to each item
68 listed. The list must be filed under seal and may be
69 amended as of right. Any reference in the case to a
70 listed identifier will be construed to refer to the
71 corresponding item of information.
72 **(h) Waiver of Protection of Identifiers.** A person waives
73 the protection of Rule 5.2(a) as to the person's own
74 information by filing it without redaction and not
75 under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of

documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an

informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv)of the E-Government Act.

Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

1 **Rule 49.1. Privacy Protection For Filings Made with the**
2 **Court**
3

4 (a) **Redacted Filings.** Unless the court orders otherwise,
5 in an electronic or paper filing with the court that
6 contains an individual's social-security number,
7 taxpayer-identification number, or birth date, the
8 name of an individual known to be a minor, a
9 financial-account number, or the home address of an
10 individual, a party or nonparty making the filing may
11 include only:
12 (1) the last four digits of the social-security
13 number and taxpayer-identification number;
14 (2) the year of the individual's birth;
15 (3) the minor's initials;
16 (4) the last four digits of the financial-account
17 number; and

18 (5) the city and state of the home address.

19 (b) **Exemptions from the Redaction Requirement.** The
20 redaction requirement does not apply to the following:

21 (1) a financial-account number or real property
22 address that identifies the property allegedly
23 subject to forfeiture in a forfeiture proceeding;

24 (2) the record of an administrative or agency
25 proceeding;

26 (3) the official record of a state-court proceeding;

27 (4) the record of a court or tribunal, if that record
28 was not subject to the redaction requirement
29 when originally filed;

30 (5) a filing covered by Rule 49.1(d);

31 (6) a pro se filing in an action brought under 28
32 U.S.C. §§ 2241, 2254, or 2255;

33 (7) a court filing that is related to a criminal
34 matter or investigation and that is prepared
35 before the filing of a criminal charge or is not
36 filed as part of any docketed criminal case;
37 (8) an arrest or search warrant; and
38 (9) a charging document and an affidavit filed in
39 support of any charging document.
40 (c) **Immigration Cases.** A filing in an action brought
41 under 28 U.S.C. § 2241 that relates to the petitioner's
42 immigration rights is governed by Federal Rule of
43 Civil Procedure 5.2.
44 (d) **Filings Made Under Seal.** The court may order that
45 a filing be made under seal without redaction. The
46 court may later unseal the filing or order the person
47 who made the filing to file a redacted version for the
48 public record.

49 (e) **Protective Orders.** For good cause, the court may by
50 order in a case:
51 (1) require redaction of additional information; or
52 (2) limit or prohibit a nonparty's remote
53 electronic access to a document filed with the
54 court.
55 (f) **Option for Additional Unredacted Filing Under**
56 **Seal.** A person making a redacted filing may also file
57 an unredacted copy under seal. The court must retain
58 the unredacted copy as part of the record.
59 (g) **Option for Filing a Reference List.** A filing that
60 contains redacted information may be filed together
61 with a reference list that identifies each item of
62 redacted information and specifies an appropriate
63 identifier that uniquely corresponds to each item
64 listed. The list must be filed under seal and may be

65 amended as of right. Any reference in the case to a
66 listed identifier will be construed to refer to the
67 corresponding item of information.
68 **(h)** **Waiver of Protection of Identifiers.** A person
69 waives the protection of Rule 49.1 (a) as to the
70 person's own information by filing it without
71 redaction and not under seal.
72

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

6-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 22, 2006

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 28, 2006, in San Francisco, California. The Committee approved proposed new Rule 25(a)(5), discussed and retained six items on the study agenda, appointed a subcommittee to address possible changes to deadlines, and discussed three new items (of which one was placed on the study agenda). The Committee will next meet in November 2006.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Item

The Advisory Committee is seeking final approval of proposed new Rule 25(a)(5).

[1] These minutes have not yet been approved by the Committee.

A. Introduction

The Committee proposes to add a new Rule 25(a)(5) that addresses privacy concerns relating to court filings. New Rule 25(a)(5) will take a "dynamic conformity" approach, under which the privacy rules applicable below will also apply on appeal. In proceedings other than appeals from a district court, bankruptcy appellate panel, or bankruptcy court, privacy will be governed by new Civil Rule 5.2 (except that when an extraordinary writ is sought in a criminal case, new Criminal Rule 49.1 will govern).

B. Text of Proposed New Rule and Committee Note

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 (5) **Privacy Protection.** An appeal in a case whose
4 privacy protection was governed by Federal Rule of
5 Bankruptcy Procedure 9037, Federal Rule of Civil
6 Procedure 5.2, or Federal Rule of Criminal
7 Procedure 49.1 is governed by the same rule on
8 appeal. In all other proceedings, privacy protection
9 is governed by Federal Rule of Civil Procedure 5.2,
10 except that Federal Rule of Criminal Procedure 49.1
11 governs when an extraordinary writ is sought in a
12 criminal case.

13 * * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

C. Changes Made After Publication and Comment

This recommended rule is a modified version of the provision as published. The changes from the published proposal implement suggestions by the Style Subcommittee:

Rule 25. Filing and Service[2]

1 **(a) Filing.**

2 * * * * *

[2] Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

3 (5) **Privacy Protection.** An appeal in a case whose

4 privacy protection ~~that~~ was governed by Federal

5 Rule of Bankruptcy Procedure 9037, Federal Rule of

6 Civil Procedure 5.2, or Federal Rule of Criminal

7 Procedure 49.1 is governed by the same rule on

8 appeal. In a~~All~~ other proceedings, privacy

9 protection is ~~are~~ governed by Federal Rule of Civil

10 Procedure 5.2, except that Federal Rule of Criminal

11 Procedure 49.1 governs when an extraordinary writ

12 is sought in a criminal case.

The Style Subcommittee suggested these changes out of concern that readers might not otherwise know the content of the trial-level rules referenced in Rule 25(a)(5). Judge Schiltz, then this Committee's Reporter, argued that the changes were unnecessary, because Rule 25(a)(5)'s caption reads "Privacy Protection." Judge Schiltz also argued that it was superfluous to specify that cases' "privacy protection was governed by" the relevant trial-level rules – rather than just stating that the *cases* were governed by those rules – because the relevant trial-level rules govern nothing but privacy protection. For the same reason, Judge Schiltz feared that the added language might confuse readers by suggesting (incorrectly) that the cited trial-level rules also govern matters other than privacy protection. The Committee, cognizant of the policy to defer to the Style Subcommittee on matters of style, voted to adopt the Style Subcommittee's changes but also to place Judge Schiltz's comments before the Style Subcommittee.

D. Summary of Public Comments

05-AP-001: National Association of Professional Background Screeners: The Association submitted the testimony that it gave before the Criminal Rules Committee in January 2006. That testimony is devoted entirely to Criminal Rule 49.1 – and, in particular, to the likely impact on professional background screeners of Criminal 49.1(a)(3)'s requirement that only the year of birth appear in court records. The Association expresses no views about Rule 25(a)(5).

05-AP-002: Committee on Court Administration and Case Management of the Judicial Conference of the United States: CACM supports Rule 25(a)(5): "Th[e] approach [taken in Rule

25(a)(5)] is consistent with the [Judicial Conference] Privacy Policy's statement that appellate cases are to be treated the same way the cases were treated below and [CACM] supports the rule as proposed." CACM also approves of the fact that Rule 25(a)(5) "gives more specific guidance than does the privacy policy" in addressing not only appeals from the lower courts, but "matters that originate in the court of appeals or that come from an administrative agency or entity other than a lower court."

05-AP-003: Peter A. Winn, Esq.: Mr. Winn, an Assistant United States Attorney and adjunct professor at the University of Washington School of Law, generally supports the privacy rules and addresses his suggestions solely to the trial-court provisions.

05-AP-004: Public Citizen Litigation Group: Public Citizen generally supports the privacy rules, although it believes that, in some respects, the trial-court provisions go too far in protecting sensitive information. For example, Public Citizen opposes Civil Rule 5.2(c), which prohibits remote electronic access to the records of Social Security and immigration cases, but permits access to those same records at the courthouse. Public Citizen believes that more information should be available by remote electronic access and less information should be available at the courthouse.

As for Rule 25(a)(5), Public Citizen "generally supports" the decision to protect "private information on appeal to the same extent it is protected in the district court." But Public Citizen opposes exempting the records of Social Security and immigration cases from remote electronic access in the appellate courts, just as Public Citizen opposes the exemption in the trial courts. Public Citizen stresses the importance of the appellate record to the outcome of a case on appeal and argues that appellate filings "are less likely to contain private information than filings in the district court because the issues on appeal are often narrower in scope and legal rather than factual in nature."

Public Citizen argues that, if the exemptions for Social Security and immigration cases are retained, then Rule 25(a)(5) should at least provide that "appellate briefs and potentially dispositive motions should be remotely available to the public in these cases, absent a court's decision to the contrary."

05-AP-005: Electronic Privacy Information Center: The Center directs its comments solely to the trial-court provisions. It does not comment on Rule 25(a)(5).

05-AP-006: National Association of Criminal Defense Lawyers ("NACDL"): The NACDL generally agrees with the approach taken in Rule 25(a)(5), but it argues that the rule or the Committee Note needs to be clarified "with respect to appellate filings in habeas corpus and 2255 matters." Such matters, NACDL points out, "are governed in the district courts by special sets of federal rules and only in the court's discretion by the civil or criminal rules." According to NACDL, this makes it difficult to know to what extent privacy protection is extended to such cases on appeal. Rule 25(a)(5) "would appear to say that habeas appeals (not being otherwise mentioned) are subject to proposed Fed. R. Civ. P. 5.2, and yet that rule by its own terms excludes filings in such cases." NACDL argues that "the appellate rule should be made clear by adding either to the Rule or to the

Committee Note a proviso which states whether the exemptions of Civil Rule 5.2(b) continue to apply in appeals from decisions in matters that were subject to those exemptions in the district court."

05-AP-007: Judge William G. Young (D. Mass.): Judge Young directs his comments solely to the trial-court provisions. He does not comment on Rule 25(a)(5).

III. Information Items

A. Time-Computation Issues

The Committee discussed the work of the Standing Committee's Time-Computation Subcommittee. The Committee had a generally positive reaction to the Subcommittee's proposed approach. Members emphasized, however, that particular deadlines would require revision in the light of the new computation approach. Members also noted that changes in computation would affect time periods set by statute as well as those set by rule; our Reporter will compile a list of statutory deadlines that would be affected. Members expressed concern that, unlike rule deadlines, statutory deadlines could not (as a practical matter) be adjusted through the Rules Enabling Act process, and thus those deadlines may become unreasonably short. We have formed a subcommittee to review existing deadlines in light of the new time-computation approach.

The Standing Committee also asked us to consider whether the concept of "inaccessibility" of the clerk's office (in time-computation rules such as Appellate Rule 26(a)(3)) should be revised to take account of issues arising from electronic service and filing. The Committee believes that these issues warrant review, and we would like to offer Mr. Charles R. Fulbruge, III, to serve on the subcommittee that considers this issue. Mr. Fulbruge – the Fifth Circuit Clerk and our liaison from the appellate clerks – was in charge of organizing the Fifth Circuit's response to Hurricane Katrina.

In addition, the Standing Committee asked us whether we would recommend changes to the "three-day rule" found in Appellate Rule 26(c). Participants in our discussion raised a number of concerns. For example, one suggested that this question merits a wait-and-see approach, given the fact that practices relating to electronic service are still in flux. Another noted that any change in the "three-day rule" for electronic service would have to address what would happen if electronic service took place on a weekend or holiday. After consideration, the Committee voted unanimously not to recommend changes in the "three-day rule."

B. Other Issues

The Committee discussed and retained a number of matters on the study agenda. The Committee will consider whether language in Rule 4(a)(4) (concerning notices of appeal) might pose a trap for a litigant who files a notice of appeal prior to the district court's disposition of a post-trial motion; it has been suggested that one possible interpretation of Rule 4(a)(4)(B) would require such

a litigant to file an amended notice of appeal (after the grant of that post-trial motion) even if the litigant does not challenge the aspects of the judgment that were amended by the court's disposition of the post-trial motion. The Committee decided to study further a proposal by the Solicitor General concerning limitations on the filing of "pro se" briefs by represented parties. The Committee will study two proposals with respect to amicus briefs: One addresses the timing of such briefs under Rule 29(e), and the other would require a disclosure statement similar to that required by Supreme Court Rule 37.6 (concerning monetary and other contributions to the preparation of an amicus brief).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 (5) **Privacy Protection.** An appeal in a case whose
4 privacy protection was governed by Federal Rule of
5 Bankruptcy Procedure 9037, Federal Rule of Civil
6 Procedure 5.2, or Federal Rule of Criminal
7 Procedure 49.1 is governed by the same rule on
8 appeal. In all other proceedings, privacy protection
9 is governed by Federal Rule of Civil Procedure 5.2,
10 except that Federal Rule of Criminal Procedure 49.1
11 governs when an extraordinary writ is sought in a
12 criminal case.

13 * * * * *

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* New material is underlined; matter to be omitted is lined through.

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

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DRAFT

Minutes of Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, CA

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Friday, April 28, 2006, at 8:30 a.m. at the Park Hyatt San Francisco. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Sanford Svetcov, Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Neil M. Gorsuch, Principal Deputy Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge J. Garvan Murtha, liaison from the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Judge Patrick J. Schiltz, the outgoing Reporter, participated in presenting the agenda items, and Prof. Catherine T. Struve, the incoming Reporter, took the minutes.

During the course of the meeting, Judge Stewart noted three departures from the Committee: Mr. W. Thomas McGough, Jr., Mr. Svetcov, and Judge Schiltz. Judge Stewart expressed the Committee's great appreciation for their service, and presented commendations to Mr. Svetcov and Judge Schiltz (Mr. McGough was unable to be present).

II. Approval of Minutes of April 2005 Meeting

The minutes of the April 2005 meeting were approved.

III. Report on June 2005 and January 2006 Meetings of Standing Committee

At the June 2005 meeting, the Standing Committee approved Rule 32.1 (concerning the citation of unpublished opinions). Judge Schiltz observed that the Standing Committee greatly shortened the Committee Note. Judge Schiltz reported that the Judicial Conference approved Rule 32.1 but rendered it prospective only (i.e., the Rule as approved by the Judicial Conference applies only to decisions issued on or after January 1, 2007); he noted that some Circuits may choose to apply the new Rule's approach retroactively as well. Also at the June 2005 meeting,

the Standing Committee approved an amendment to Rule 25(a)(2) (authorizing the adoption of local rules that require electronic filing), and approved for publication new Rule 25(a)(5) (discussed below).

The Appellate Rules Committee had no items on the agenda for the Standing Committee's January 2006 meeting. Judge Stewart noted that the January meeting included a very interesting discussion on the legacy of Chief Justice Rehnquist.

IV. Action Item

A. Item No. 03-10 (new FRAP 25(a)(5) – electronic filing / privacy protections)

Judge Stewart invited Judge Schiltz to introduce the following proposed amendment and Committee Note:

Rule 25. Filing and Service

1 **(a) Filing.**

2 * * * * *

3 (5) **Privacy Protection.** An appeal in a case that was

4 governed by Federal Rule of Bankruptcy Procedure

5 9037, Federal Rule of Civil Procedure 5.2, or

6 Federal Rule of Criminal Procedure 49.1 is governed

7 by the same rule on appeal. All other proceedings

8 are governed by Federal Rule of Civil Procedure 5.2,

9 except that Federal Rule of Criminal Procedure 49.1

10 governs when an extraordinary writ is sought in a

11 criminal case.

12 * * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

Judge Schiltz summarized the genesis of proposed new Rule 25(a)(5). The E-Government Act of 2002 directs that the rulemakers address privacy concerns relating to electronic filing. In response, the Standing Committee's E-Government Subcommittee, the Judicial Conference's Committee on Court Administration and Case Management ("CACM"), and the chairs and reporters of the advisory committees have developed proposed privacy rules for use at both trial and appellate levels. Judge Schiltz noted the decision to adopt a "dynamic conformity" approach for the Appellate Rules; under this approach, proposed Rule 25(a)(5) adopts by reference the provisions of the relevant trial-court Rules. Proposed Rule 25(a)(5) was published for comment in August 2005; the Committee received seven public comments, of which three addressed Rule 25(a)(5) (the other four addressed only the trial-court proposals).

Judge Schiltz reported that CACM supports the approach taken in Rule 25(a)(5).

Judge Schiltz next discussed the comments received from the Public Citizen Litigation Group ("Public Citizen"). Public Citizen takes issue with the proposed treatment of Social Security and immigration case records, at both the trial and appellate levels. Judge Schiltz noted the Judicial Conference's policy that privacy protection on appeal should track the privacy protection applicable in the proceeding below. Judge Schiltz observed that the Civil Rules Committee would revisit the issues raised by Public Citizen this spring, and suggested that the Appellate Rules Committee should defer to the judgment reached by CACM and the Civil Rules Committee on these questions.

Third, Judge Schiltz summarized the views of the National Association of Criminal Defense Lawyers ("NACDL"), which asserts that Rule 25(a)(5) requires clarification with respect to habeas and § 2255 proceedings. Judge Schiltz argued that, to the contrary, Rule 25(a)(5) is clear: Under Rule 25(a)(5), appeals in habeas and § 2255 proceedings are governed by Civil Rule 5.2; and Civil Rule 5.2(b)(6) excludes habeas and § 2255 proceedings from the redaction requirements in Civil Rule 5.2(a).

Judge Schiltz then turned to the changes suggested by the Style Subcommittee. Those changes would use language referring to "a case whose privacy protection was governed by" the relevant trial-level privacy rule, rather than language referring to "a case that was governed by" the relevant trial-level privacy rule, thus:

> **Privacy Protection.** An appeal in a case whose privacy protection ~~that~~ was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In a~~A~~ll other proceedings, privacy protection is ~~are~~ governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

The Style Subcommittee's concern was that readers might not otherwise know that the cited trial-level rules deal with privacy protections; one member expressed agreement with this concern. Judge Schiltz argued that the Style Committee's proposed language would be redundant and ambiguous; on the other hand, he noted that the proposed changes are stylistic and that this Committee ordinarily defers to the Style Subcommittee on matters of style. Judge Murtha stated that he would place Judge Schiltz's comments before the Style Subcommittee. Mr. Rabiej noted that under the relevant protocol, the Advisory Committees are to defer to the Style Subcommittee on matters of style, but can also send an alternative style suggestion to the Standing Committee for consideration. Judge Stewart proposed that the Advisory Committee approve Rule 25(a)(5) as restyled by the Style Subcommittee, but that the Advisory Committee ask the Style Subcommittee to reconsider its view. This proposal was moved and seconded, and the motion carried (over three dissents).

V. Discussion Items

A. Item No. 05-01 (FRAP 21 & 27(c) – conform to Justice for All Act)

Mr. Letter described the provisions in the Justice for All Act of 2004 which concern appellate review of district court determinations regarding rights for victims of crime. The Committee had asked Mr. Letter to report on whether the timing constraints imposed by those provisions necessitate changes in the Appellate Rules. Mr. Letter reported that after polling relevant parts of the Department of Justice and United States Attorneys' Offices, he was aware of only one appellate case addressing such timing issues. In *Kenna v. U.S. District Court*, 435 F.3d 1011 (9th Cir. 2006), when the Ninth Circuit Court of Appeals granted a mandamus petition under the Act, it noted and apologized for its failure to comply with the Act's time limits, and stated that it was adopting procedures for handling such petitions in the future. From the Clerk of the Ninth Circuit Mr. Letter learned that the Circuit has adopted a new rule – Rule 21-5 – concerning petitions under the Act. Rule 21-5, however, simply requires notice to the court when a petition will be filed under the Act, so that a panel may then issue orders to promote speedy handling; Rule 21-5 does not itself set such procedures. To Mr. Letter's knowledge, no other Circuits have adopted rules implementing the Act's appellate review provisions. Though the Criminal Rules Committee has proposed rules amendments relating to the Act, Mr. Letter reported that those amendments do not concern appellate review.

Mr. Letter stated the Department of Justice's belief that no new Appellate Rules provisions are warranted at this time; he recommended that the Committee monitor developments under the Act. Mr. Fulbruge reported that the appellate clerks with whom he has discussed this question tell him that timing questions under the Act have not been a big issue. Mr. McCabe noted that the AO is aware of only four instances nationwide in which a district court denied a right asserted by a victim under the Act. A member noted that it is unclear whether the Appellate Rules are truly in tension with the Act, since the Act's provisions may be read in different ways. A member predicted that appellate-review issues under the Act will be very rare, since district judges will be careful not to impinge on victims' rights under the Act, and U.S. attorneys (and probation officers) will be careful to point such issues out to district judges. Mr. McCabe noted that the AO is setting up a computer system to notify crime victims of all relevant court proceedings. Mr. Letter promised that the Department of Justice would continue to monitor practice under the Act, and that he would keep the Reporter updated. Judge Stewart requested that if new issues arise under the Act, Mr. Letter should notify the Committee without waiting until the next meeting.

B. Items Awaiting Initial Discussion

1. Item No. 05-04 (FRAP 41 – *Bell v. Thompson*)

Judge Schiltz outlined the litigation in *Bell v. Thompson*, 125 S. Ct. 2825 (2005), and explained how that case highlighted ambiguities in Rule 41, which governs issuance of the mandate.

In *Bell*, Thompson (a capital habeas petitioner) appealed from a district court judgment dismissing his petition. The Sixth Circuit Court of Appeals affirmed, but stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari. After certiorari was denied, Thompson obtained an order from the Court of Appeals staying issuance of the mandate until the Supreme Court resolved Thompson's petition for rehearing. After the Supreme Court denied rehearing, the Court of Appeals' mandate still failed to issue – but the parties (not noticing this omission) proceeded to litigate other matters (focusing on whether Thompson was competent to be executed). Meanwhile, without notice to the parties, the Court of Appeals reexamined the merits of Thompson's habeas petition, and five months after the Supreme Court denied rehearing the Court of Appeals issued an amended opinion vacating and remanding for an evidentiary hearing.

On review in the Supreme Court, Thompson contended that the Court of Appeals' failure to issue the mandate (after the Supreme Court's denial of rehearing) in effect constituted a third stay, authorized by Rule 41(b)'s grant of authority to "extend the time" for issuance of the mandate. The state argued that Rule 41(d)(2)(D) required the Court of Appeals to issue its mandate "immediately" after certiorari was denied, and accordingly that both the second and third stays were impermissible. The Supreme Court avoided this broader question, and held for the state on the ground that even if Rule 41 would authorize a stay of the Court of Appeals' mandate following denial of certiorari, and even if the third stay could have taken effect without entry of an order, the issuance of such a stay under the circumstances of *Bell* constituted an abuse of discretion.

Judge Schiltz pointed out that *Bell* uncovered ambiguities in Rule 41, concerning whether the Court of Appeals has authority to stay issuance of its mandate following denial of certiorari, and if so, under what circumstances. The question, then, is whether it would be worthwhile for the Committee to revisit Rule 41 with a view to clarifying these matters. Judge Schiltz observed that *Bell*'s fact pattern was very unusual. A member concurred in this assessment, and noted that any attempt to clarify the questions aired in *Bell* would raise tough issues regarding many different possible fact patterns. Mr. Fulbruge reported that he did not think appellate clerks see a need for changes in Rule 41 at this point. Another member noted that the lawyer whose position was favored by the Court of Appeals' judgment ordinarily would seek to ensure that the Court of Appeals did in fact issue its mandate. Mr. Letter noted that counsel can readily check whether the mandate has issued by using the PACER system. A district judge member noted that while lawyers may not always think to check whether the mandate has issued, he makes it a practice to check whether the Court of Appeals' mandate has issued before he proceeds. Mr. Fulbruge reported that he gets calls from district judges asking whether the mandate has issued, which indicates that the district judges pay attention to this question.

By consensus, the Committee removed this item from the study agenda. Judge Stewart will write to John Kester (the Standing Committee member who brought this issue to this Committee's attention) to explain that the Committee had considered the issue.

2. Item No. 05-05 (FRAP 29(e) – timing of amicus briefs)

Judge Schiltz summarized the questions raised by Public Citizen regarding the time for filing amicus briefs under Rule 29(e). Public Citizen points out that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions.

Mr. Letter agreed that such difficulties could arise, but noted that when they do, the appellant can move for an order granting more time to respond. Mr. Fulbruge agreed that if the issue arose, the Court of Appeals would probably grant such a request. (A member noted that it would be inefficient to have the party file a supplemental brief responding to an amicus' contentions; Mr. Letter observed that the party could request time to file an amended brief that incorporates a response to the amicus.)

Mr. Letter stated that the Department of Justice would oppose a rule change that shortened the time allotted to amici filing briefs in support of the appellee, and that the Department would not support a change that lengthened the time for filing the appellant's reply brief. Mr. Letter noted that it is often not possible for the government to share its draft briefs with amici in advance of filing. Mr. Letter expressed the hope that timing difficulties would arise less often as electronic filing becomes more prevalent.

A member asked why the Appellate Rules' approach differs from that taken by the Supreme Court rules (which require that amici submit their briefs within the time allowed for filing the brief of the party whom they are supporting).[1] Mr. Letter stated that the rationale for the Appellate Rules' approach was to permit amici to review the party's filing, so as to minimize duplication of arguments. The member responded that the Rules have not been effective in serving this goal. Judge Schiltz noted that the Appellate Rules used to take the same approach as the Supreme Court rules; a member voiced support for a return to this approach. Mr. Letter observed that the government needs time to look at a party's brief before deciding whether to file an amicus brief. A member countered that a private party is free to show the government its brief prior to filing, to facilitate the government's decision. Judge Stewart noted that it is helpful for an amicus brief to state clearly what it adds to the arguments made in the party's brief.

A number of participants voiced the view that these timing questions merit further study. A member pointed out that these issues could be addressed as part of changes to be considered concerning time computation more generally. Mr. Letter undertook to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting. Judge Stewart observed that it would be useful to consult Justice Randy Holland, a Committee member who was unable to attend this meeting.

By consensus, the Committee retained this item on its discussion calendar.

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[1] *See* Supreme Court Rule 37.3(a).

3. Item No. 05-06 (FRAP 4(a)(4) – amended NOA after favorable or insignificant change to judgment)

Judge Schiltz described the decision in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), in which Judge Leval raised questions concerning the operation of Rule 4(a)(4) in cases where a party files a notice of appeal and the district court subsequently alters or amends the judgment. In *Sorensen*, the district court initially entered a judgment which awarded relief on certain claims and dismissed others. The plaintiff filed a notice of appeal, and the district court subsequently granted a posttrial motion dismissing one of the claims on which it had initially awarded relief. The plaintiff failed to file a timely notice of appeal that encompassed the judgment that ultimately resulted after this grant of posttrial relief. The Court of Appeals held that the plaintiff failed properly to preserve her challenge to the district court's dismissal of the relevant claim. In particular, the court held that under Rule 4(a)(4)(B) the plaintiff's initial notice of appeal did not effect an appeal from the court's later dismissal (on the posttrial motion) of one of the plaintiff's claims. Writing for the court, Judge Leval characterized Rule 4(a)(4) and its Note as ambiguous and contradictory, and raised the possibility that problems could also arise for an appellant who fails to file a new or amended notice of appeal after the district court amends the judgment in the appellant's *favor*.

Judge Schiltz reported that he had done a quick search of the caselaw and had failed to find other opinions reading Rule 4 in the same way as the *Sorensen* court. A member noted that lawyers tend to file a new notice of appeal just in case, and stated that *Sorensen* is the only case he knows of in which this issue has arisen. Mr. Fulbruge, too, stated that he had not come across such cases. Another member questioned how often the timing configuration would be such as to permit the issue to arise at all (given the time limits for filing postjudgment motions and the fact that a postjudgment motion tolls the time for filing a notice of appeal).

A member asked whether the Note could be amended to clarify the issue, without amending the Rule; Judge Schiltz responded that he did not think so. Mr. Rabiej noted that there had been a similar desire to clarify the operation of certain Evidence Rules without amending the Rules themselves, and that the FJC had responded by producing an explanatory pamphlet.

A member expressed disbelief that any court would interpret Rule 4(a)(4) to require an appellant to file an amended notice of appeal just because the district court had amended the judgment *in the appellant's favor*. Another member agreed that such an interpretation would be absurd. Mr. Letter observed, though, that if such a situation arose, his office would file a new notice of appeal to be on the safe side.

By consensus, the Committee decided to leave the matter on the study agenda. The Reporter will inquire into the background of the 1998 amendments (which produced the relevant language in Rule 4(a)(4)).

4. Item Nos. 06-01 (FRAP 26(a) – time-computation template) and 06-02 (adjust deadlines to reflect time-computation changes)

Judge Schiltz described the work of the Standing Committee's Time-Computation Subcommittee, for which he has served as reporter. The Subcommittee's goals are to simplify and reconcile the time-computation provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules. The Subcommittee has circulated to the Advisory Committees a template showing the proposed approach; that template will be presented to the Standing Committee for approval at its June 2006 meeting. Assuming approval of the template, the Advisory Committees will consider conforming amendments to their respective Rules, and will also undertake a revision of relevant deadlines to address issues raised by the change in computation approach. The goal is to publish the proposed Rules amendments for public comment, as a package, in August 2007.

A notable feature of the proposed template is that it takes a "days are days" approach – i.e., all intermediate days are counted when computing a deadline. By contrast, current Appellate Rule 26(a)(2) excludes intermediate weekend days and holidays when computing periods less than eleven days (unless the period is stated in calendar days).

Mr. Fulbruge noted that the appellate clerks favor the proposed approach. An attorney member cautioned that such changes would be acceptable so long as relevant periods were extended to take account of the change in computation method; otherwise, the member warned that the amendments could be seriously problematic. The member noted that some periods may require significant lengthening, and also noted that the "three-day rule" (discussed below) will impact the analysis. Another attorney member expressed agreement.

Mr. Letter queried why Rule 26(a)(4) treats state holidays (of the state in which is found the relevant district court or the circuit court's principal office) as legal holidays for purposes of time computation. Mr. Fulbruge reported that federal courts in Texas, Mississippi and Louisiana do not close on state holidays; he also noted Louisiana's practice of having half-holidays (which vary parish-to-parish). Judge Stewart observed that the federal court in New Orleans is obliged to close on Mardi Gras because its employees cannot get to work. Judge Schiltz agreed that there are some federal courts that do close on some state holidays. Judge Schiltz recalled that the rationale previously given for the state-holiday rule is that its application (which is likely to be rare) will protect litigants in the unusual circumstances where that may be necessary.

On the general topic of revisions to the deadlines, a member emphasized that everyone recognizes that revising the time-computation approach will necessitate changes in the deadlines. The member stressed that right now, all the Committee would be doing is approving the approach in principle.

Another member observed that changes in the time-computation approach could also impact deadlines set by court order or by statute. A district judge member noted that when he sets deadlines by court order he picks a date rather than setting a number of days, and he pointed out that this

approach would leave deadlines set by court order unaffected by time-computation changes. Statutory time periods, however, were noted (such as that set by 28 U.S.C. § 1292(b)[2] and that set by the Class Action Fairness Act[3]). Mr. Letter noted that, under 28 U.S.C. § 2072(b), rules promulgated under the Rules Enabling Act supersede any previously enacted statutory provisions that conflict. Members expressed concern that, unlike rule deadlines, statutory deadlines could not (as a practical matter) be adjusted through the Rules Enabling Act process, and thus those deadlines may become unreasonably short.

Judge Schiltz observed that other Advisory Committees have set up subcommittees to reconsider all relevant deadlines. Judge Stewart thereupon named a subcommittee to reconsider deadlines in the Appellate Rules. The subcommittee includes Judge Sutton (as chair), Ms. Mahoney, and Mr. Letter. By consensus, the Committee decided that: (1) The concerns aired above (with respect to supersession of statutory provisions and with respect to the concerns over revision of deadlines) should be raised with Judge Kravitz (the Chair of the Time-Computation Subcommittee) and/or the Standing Committee; (2) Judge Sutton's Subcommittee will study the relevant deadlines; and (3) The Committee will continue to look at these issues during the fall.

Next, the Committee discussed questions relating to the accessibility of the clerk's office. Judge Schiltz noted that the Standing Committee has asked the Advisory Committees for guidance on whether rules such as 26(a)(3) (concerning inaccessibility of the clerk's office) should be changed in the light of the advent of electronic filing. How should the rules treat a situation where the clerk's office is physically inaccessible but electronically accessible? How should the rules treat the converse situation? A member pointed out that so long as paper filings are permitted the courthouse's physical accessibility will remain significant. Mr. Fulbruge stated that the issue requires attention; he reported that after Hurricane Katrina, his court faced challenges relating to electrical power, the electronic docket and email capability for the judges. Mr. Fulbruge noted that the courts are looking into the feasibility of using backup servers to avoid outages in the future, and he observed that a well-functioning system of backup servers could moot some issues concerning court accessibility. By consensus, the Committee determined the following: (1) The Committee agrees that these issues warrant review, and (2) the Committee will offer Mr. Fulbruge to serve on the relevant subcommittee.

Judge Schiltz noted that the Standing Committee has also requested input from the Advisory

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[2] *See* 28 U.S.C. § 1292(b) (authorizing certain interlocutory appeals based on certification by district court and permission by court of appeals, so long as the application for permission "is made to [the court of appeals] within ten days after the entry" of the district court order containing certification).

[3] *See* 28 U.S.C. § 1453(c)(1) (providing with respect to removals under Section 1453 that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand ... if application is made to the court of appeals not less than 7 days after entry of the order").

Committees on whether changes are warranted in the "three-day rule" set by Appellate Rule 26(c) and certain other rules. This rule provides that, when a party is to act within a set period after service of a paper on the party, and the paper is served by means other than personal service, the party gets an additional three days in which to act. Judge Schiltz recounted that electronic service was included in the "three-day rule" in order to induce parties to consent to its use,[4] and he suggested that when electronic service no longer required party consent, such a rationale would no longer apply. A member suggested that a wait-and-see approach may make sense at this time. Mr. McCabe noted that when electronic filing is used, the other parties get an electronic notification from the court, with a link to the electronic copy of the filing. Mr. Letter queried what would happen if electronic filing and service were removed from the three-day rule and a party decided to e-file on a weekend or holiday. A member cautioned that there will always (for the foreseeable future) be small practitioners who lack the ability to file electronically; he suggested that there is no reason to tackle the three-day rule in addition to the calendar-days issue. The member noted that the practicing bar would prefer moderation in the rate of rule-making. Mr. Fulbruge observed that the district courts have followed the lead of the bankruptcy courts in implementing electronic case filing; but Mr. Fulbruge noted that the large volume of pro se filings will continue to be made in hard copy rather than electronically.

By a unanimous vote, the Committee determined to recommend no action on the "three-day rule" in Rule 26(c).

5. Item No. 06-03 (new FRAP 28(g) – pro se filings by represented parties)

Mr. Letter described a proposal approved by the Solicitor General for a new Rule 28(g) which would generally bar the Courts of Appeals from accepting "pro se briefs" filed by represented parties. The proposed rule would contain exceptions for situations where counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or where the party seeks appointment of new counsel. The proposal would require the clerk to forward any such pro se filing to the party's attorney.

Mr. Letter stated that such "pro se" filings by represented parties are a major problem for U.S. Attorneys' offices, because of the burden imposed when the U.S. Attorney feels obliged to respond to multifarious arguments raised in the additional "pro se" filing. He also posited that such filings could burden the courts, and might harm the "pro se" filer by distracting from stronger arguments selected by the party's counsel.

A member recounted his experience as appointed counsel in CJA cases. He recalled that sometimes he refused to raise issues because he considered them frivolous. Often, that was the end of the matter; but sometimes his client would submit a "pro se" brief. In his experience, when that

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[4] Judge Schiltz noted that under Rule 25(c)(1)(D), parties can consent to service by electronic means.

occurred, the court usually accepted the "pro se" filing; the U.S. Attorney usually did not respond; and the arguments in the "pro se" brief would get only a passing mention during the oral argument.

Mr. Letter responded that he would be unwilling to take the approach the member described: As he put it, the U.S. Attorney's Office ignores an issue in the pro se brief at its peril. A member suggested that if a court felt that a point in a pro se brief warranted attention, it could call on the U.S. Attorney for a response. The member questioned whether the proposed Rule 28(g) might encourage requests for appointment of new counsel. The member also suggested that permitting the filing of pro se briefs could head off some claims of ineffective assistance of counsel.

A district judge member observed that "pro se" briefs are frequently filed in the district court, and that the court reviews those filings to make sure that it is not missing anything. A member then asked why the rule on "pro se" filings in the Courts of Appeals should differ from the practice in the district courts. Mr. Letter responded that in appellate practice, there is a greater expectation that the lawyer will play a role in winnowing out weaker arguments. A member noted that under *Martinez* there is no *Faretta* right to self-representation on appeal.[5] Judge Sutton observed that the Sixth Circuit accepts "pro se" briefs. Judge Stewart noted the need to consider practicality; he observed that "pro se" briefs can be difficult to scan electronically, and that such briefs generally employ a "shotgun" approach rather than zeroing in on new or particularly strong issues.

A member suggested that an alternative approach would be to provide that the Court of Appeals will not act upon an argument in a "pro se" brief without giving the government an opportunity to respond to the relevant argument. Mr. Fulbruge noted the Fifth Circuit's rule that a represented party cannot file a "pro se" brief without leave of court.[6] When a represented party attempts to make such a filing, the clerk's office notifies the party of the rule, encourages the party to contact his or her counsel, and notes that the party can make a motion for leave to file. If the Court of Appeals grants the party leave to file the brief, the order can provide the other side with a chance to respond. Mr. Fulbruge argued against the provision in proposed Rule 28(g) that would require the clerk's office to send the party's filing to the party's counsel.

A judge member observed that the filing of a "pro se" brief can occasion awkwardness for the party's counsel; but he also noted that sometimes the "pro se" brief is better than counsel's brief. The member stated that the Fifth Circuit's approach (requiring court permission) might be a good solution. Mr. Letter expressed a tentative view that the government would prefer the Fifth Circuit approach to a more permissive one.

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[5] *See* Faretta v. California, 422 U.S. 806, 836 (1975) (holding that criminal defendant has Sixth Amendment right to represent self at trial); Martinez v. Court of Appeal of California, 528 U.S. 152, 154 (2000) (holding that the *Faretta* right does not extend to appeals).

[6] *See* Fifth Circuit Rule 28.7 ("Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.").

Mr. Letter undertook to investigate further (by ascertaining the Supreme Court's rule, and by canvassing colleagues in the Justice Department for their views on various options), and to email his findings to the Committee in advance of its next meeting. Mr. Fulbruge agreed to contact clerks in the First, Second, Fourth and Sixth Circuits to learn what their experience has been.[7]

VI. Additional Old Business and New Business

There was no additional old business. Under new business, a member raised three issues.

First, the member noted that some of the Appellate Rules treat states in the same way as the U.S.,[8] but that state and federal government litigants receive different treatment with respect to the time limit for filing a notice of appeal[9] and the time limit within which to petition for panel rehearing or rehearing en banc.[10] The member reported that some state solicitor generals would like states to be accorded the same treatment as the U.S. A member expressed support for this idea. Another member observed that if the states were given more time to decide whether to appeal, they might be more likely to forgo appeals in some cases. The item was not placed on the agenda, however, because the committee will wait to see whether a formal recommendation on the matter results from the summer meeting of the National Association of Attorneys General.

Second, the member reported that some judges on the Federal Circuit would favor adoption of a rule that requires amici to disclose whether any other entity contributed monetarily to the preparation or submission of the amicus brief and whether counsel for a party worked on the amicus brief. (The Supreme Court has such a rule – Rule 37.6.) A member asked why the Federal Circuit could not impose such a requirement by local rule. Another member, though, pointed out that an Appellate Rule on the topic could provide welcome clarity. This item was put on the study agenda.

Third, the member reported that some Federal Circuit judges would favor a decrease in the permitted length of reply briefs from 7,000 words to 3,500 words. An attorney member expressed skepticism, arguing that such a reduction would not improve the resulting briefs and would cause great opposition from the bar. A judge member noted that the current length did not cause him

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[7] A member suggested that it would be important to canvass the views of practitioners outside the Justice Department, and that it could be helpful to ask the AO and/or the FJC to study courts' experiences with different approaches. Judge Stewart observed that these measures could be taken after the Committee has had an opportunity for further discussion.

[8] *See, e.g.*, Rule 29(a) (permitting federal and state governments to "file an amicus-curiae brief without the consent of the parties or leave of court").

[9] *See* Rule 4(a)(1).

[10] *See* Rules 40(a)(1) (panel rehearing) and 35(c) (rehearing en banc).

concern (because he skims portions that seem unhelpful) and that some cases are complex enough that they really require the full 7,000-word length. Another attorney member strongly opposed shortening the limit, noting that it would create an extra hassle for attorneys who would have to move for leave to enlarge the length. By consensus, this item was not placed on the study agenda.

VII. Date and Location of Fall 2006 Meeting

Mr. Rabiej will circulate to the Committee suggestions for a meeting date in November 2006; Friday will be the preferred day of the week for the meeting.

V. Adjournment

The Committee adjourned at 11:40 a.m.

Respectfully submitted,

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Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — May 2006

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study Approved with further changes by Advisory Committee 04/05 Approved by Standing Committee 06/05 Approved with changes by Judicial Conference 09/05 Approved by Supreme Court 04/06
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04 Draft approved 04/05 for submission to Standing Committee Approved for publication by Standing Committee 06/05 Published for comment 08/05 Restyled draft approved 04/06 for submission to Standing Committee, with request that Style Subcommittee reconsider style changes
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04 Published for comment 11/04 Approved with changes by Advisory Committee 04/05 Approved with changes by Standing Committee 06/05 Approved by Judicial Conference 09/05 Approved by Supreme Court 04/06
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 04/06; awaiting report from Department of Justice
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Awaiting initial discussion Discussed and retained on agenda 04/06
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06

FRAP Item	Proposal	Source	Current Status
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06; deadline subcommittee appointed
06-03	Add new FRAP 28(g) to bar pro se filings by represented parties.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/06; awaiting report from Department of Justice
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Awaiting initial discussion

7-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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JERRY E. SMITH
EVIDENCE RULES

To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 20, 2006**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1 for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines

ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 222. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

There were many public comments received on this and the other *Booker* amendments. The Sentencing Commission stated that the amendment tracked the approach the Commission believes to be implicit in *Booker*, but it suggested that the word "calculate" be replaced with "determine and calculate." Other comments suggested that the amendment gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). There was extensive discussion of the public comments and an additional concern, raised at the meeting, that the amendment might be read as requiring a complete guideline calculation in every case. That would be inconsistent with cases such as *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). *Crosby* recognized that the district courts would "normally" have to determine the applicable guideline range. *Id.* at 111. However, in some cases the court may conclude that it is unnecessary to resolve a particular guideline issue because statutory factors under 3553(a) require a variance that moots the guideline issue. *Id.* at 112.

The Committee agreed that the function of the rule is to advise a defendant who is pleading guilty of the manner in which the court will determine the defendant's sentence. The published language captures the approach taken by most courts after *Booker*. There was, however, agreement that it would be useful to make it clear in the Note that the rule was not intended to be inconsistent with *Crosby*.

After considering other proposals, the Committee voted 9 to 3 to forward the amendment to the Standing Committee as published with the addition of a reference to *Crosby* in the Committee Note in order to avoid any possible confusion. Here, and in the other *Booker* amendments, the Committee also agreed to delete from the Committee Note a reference to the Fifth Amendment requirement of proof beyond a reasonable doubt from the description of *Booker*.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32, Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

These amendments adapt two subdivisions of the Rule 32 to *United States v. Booker*, 543 U.S. 220 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). The Committee is proposing amendments only to subdivisions (d) and (h), which govern presentence reports and notice of possible departures. As noted below, the Committee has withdrawn the

proposed amendment to subdivision (k) because of legislative activity that occurred after the approval of the amendments for publication and comment.

Subdivision (d). Subdivision (d) of the rule establishes the requirements for presentence reports. It already requires that the report include the applicable Guidelines and information relevant to the guideline calculations. The amendment adds the requirement that the report include information relevant to the statutory criteria under § 3553(a). However, in light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included only when required by the court.

The Committee received critical comments from the Federal Public Defenders and the National Association of Criminal Defense Lawyers who saw the published amendment as improperly giving primacy to the Guidelines in the sentencing process. They also urged that the rule address individually each of the sentencing factors under 3553(a) and that the rule be revised to require the probation office to collect all information relevant to each of the statutory factors. Additionally, they suggested that the title of the heading should be amended to refer to the "advisory" character of the Guidelines.

The Committee agreed that the heading should be revised to refer to the Guidelines as "advisory," and with that change it approved the amendment as published. The Committee felt the published language accurately reflects the approach most courts are taking after *Booker*, and it avoids placing an open-ended and unmanageable obligation on the probation office.

In the Committee Note accompanying the amendment to this subdivision and subdivision (h), the Committee also deleted the Fifth Amendment from the description of the *Booker* decision.

Subdivision (h). This amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment states that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or prehearing submissions. The amendment refers to departures and "non-guidelines" sentences. In the aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have constituted departures under the mandatory guideline regime, but are now permissible because the Guidelines are advisory (including the terms ""non-Guidelines sentence" and "variance"). As stated in the Committee Note, the amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

The public comments to the published draft revealed several ambiguities in the language. The language was interpreted by some as overly broad (requiring notice whenever the court intends

to rely on a non-guideline factor) and by others as too narrow (requiring no notice when a factor has been identified for one purpose, but the parties are unaware that the court is considering it for a wholly different purpose). Given the potential for misinterpretation, the Committee agreed that a modification of the published language was needed, and it unanimously accepted the alternative language proposed by the Sentencing Commission.

Subdivision (k). The Standing Committee also approved the publication of a proposed amendment to subdivision (k) intended to standardize the collection of data regarding post-*Booker* sentencing by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference. This provision, which provoked considerable controversy, was withdrawn by the Committee in light of the enactment of § 735 of the USA Patriot Improvement and Reauthorization Act, which amended 28 U.S.C. § 994(w). The amended statute requires the chief judge of each district to provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee withdrew its request for an amendment to the Criminal Rules, and the Advisory Committee concluded that an amendment to subdivision (k) was no longer necessary.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32(d) and (h), as modified after public comment, be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the Guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the decision in *Booker*.

Both the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL) suggested changes in either the amendment or the note. After discussion, the Committee decided not to alter the amendment. In essence, the proposed changes introduced additional issues that were not part of the amendment as published. NACDL suggested that given the advisory character of the Guidelines, it is no longer appropriate for the rule to require that the motion be made by the government, since powerful evidence of cooperation should be considered under 18 U.S.C. § 3553(a) even in the absence of such a motion. The language of the rule, however, was enacted by Congress. Even if the Committee had the authority to delete this requirement under the Rules Enabling Act, it could not do so without publishing such an amendment for public comment. The

Sentencing Commission raised the question whether the *Booker* remedial opinion is applicable to the post-sentencing context. It suggested that the Committee Note be amended to address this issue. The Committee unanimously declined to introduce the new language to the Note, or otherwise to alter the rule as published for public comment. (The only exception was the agreement to eliminate the reference to the Fifth Amendment in the description of the *Booker* decision in this Note, as well as the notes accompanying the other *Booker* amendments.)

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D). The amendment of the Civil Rule became effective on December 1, 2005. The proposed amendment to Rule 45 tracks the language of the civil rule.

The Committee received only one comment on the proposed amendment, which consisted of a statement of strong approval for the change. Without objection the Committee approved the amendment of Rule 45.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes provisions regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee.

The e-government rules, including Rule 49.1, generated extensive public comment. A subcommittee reviewed the public comments and considered the advice of Professor Capra and the reporters for the other committees prior to the Committee's April meeting.

Many of the public comments dealt with considerations common to all of the e-government rules, and the Committee sought to incorporate the common changes recommended by Professor Capra after consultation with all of the reporters. These included (1) using of the term "individual" rather than "person" throughout the rule, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed.

The Committee also discussed the provisions for filing under seal and protective orders. The provisions, which were common to all of the e-government rules, were the topic of considerable commentary from the public and members of the Committee. The Committee ultimately endorsed a change in the provision on protective orders, and we understand that language may be adopted by the other advisory committees. The discussion focused on the difference between the standards for sealing and those for protective orders, which were not parallel in the amendment as published for comment. Protective orders were authorized only "[i]f necessary to protect private or sensitive information," while no similar restriction is placed on sealing. The Committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1. The Committee concluded, however, that the provision for protective orders should be modified to incorporate the more flexible standard for the issuance of protective orders set forth in Civil Rule 26(c), which employs the phrase "[f]or good cause shown." The Committee amended subdivision (d) to incorporate this language, and Professor Capra said that he would bring this change to the attention of the other advisory committees. After the Committee meeting all of the reporters agreed to recommend language based on this change to Rule 49.1, but to shorten the phrase to "cause shown." This phrasing is used elsewhere in the Criminal Rules, so we have conformed Rule 49.1 as well to "cause shown." (Note that this provision is now found in (e) due to the renumbering following the addition of a new subdivision (c) regarding immigration cases; the new subdivision is discussed below.)

Other issues addressed in the public comments and Committee discussion were specific to Rule 49.1 or bear most heavily on that rule.

Several issues related to information identifying individuals, particularly date of birth and social security number. After consultation with CACM staff and Professor Capra, the Committee was persuaded that the current rule reflects a careful balancing of interests, and it declined to make any changes. It thus rejected the request of background screeners, who urged that the public record in criminal cases should include full identifying information, such as date of birth, in order to aid private criminal records searches. It also rejected a suggestion from within the Committee that even the disclosure of the last four digits of an individual's social security number might create a danger

of breaches of privacy or identity theft. The Committee was informed that CACM had considered the privacy and security issues relating to social security numbers, and had based the rule permitting disclosure of the last four digits on the practice of the Social Security Administration.

Several issues concerned actions under 18 U.S.C. §§ 2254, 2255, and 2241, which as noted above are covered by both Civil Rule 5.2 and Criminal Rule 49.1.

CACM and the National Association of Criminal Defense Lawyers (NACDL) expressed concern that a categorical exemption from redaction for filings in proceedings under 18 U.S.C. §§ 2254, 2255, and 2241, was unnecessarily broad. The Committee's rationale for exempting these actions was its conclusion that, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. To meet the overbreadth objection, the Committee decided to restrict the exemption to filings by pro se plaintiffs in these actions. The Committee declined, however, to eliminate the exemption entirely. It rejected the suggestion that it would be sufficient merely to relax the application of the redaction requirements in the case of pro se filings. If the rule as a technical matter requires redaction in the case of pro se filings, there could be adverse legal consequences for pro se plaintiffs who failed to redact sensitive information. If a pro se filing under §§ 2254, 2255, and 2241 contains unredacted information that raises security concerns, the court can issue a protective order.

Subsequent to the Advisory Committee meeting, Professor Cooper raised an additional issue regarding actions under 18 U.S.C. § 2241 raising immigration claims. Without going into great detail, the issue that emerged concerned efforts under Civil Rule 5.2 to mesh the special considerations attendant to immigration cases (including limited remote access) with the considerations applicable to actions under §§ 2254, 2255, and 2241. All of the reporters agreed that it was important to apply the same standards to all 2241 cases involving immigration rights. Rather than import additional provisions into Rule 49.1 to deal with such cases, the reporters agreed that it would be preferable to deal with 2241 cases involving immigration rights exclusively under Civil Rule 5.2. Accordingly, subdivision (c) was added to provide that such cases are governed exclusively by Rule 5.2. Since this change was needed to prevent a potential conflict with some or all of the provisions in Rule 5.2 governing immigration claims, it seemed to fall well within the authority that the Committee agreed to give to Judge Bucklew and the reporter.

CACM objected to the categorical exemption from redaction in Rule 49.1(b)(8), (9), and (10), for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of a docketed case. In CACM's view, redaction of specific private or sensitive information should be sufficient. The Committee reviewed the reasons for its original decision to exempt these filings, particularly the importance of particularity and identification in documents such as arrest or search warrants. Also, the public has a right to know with some specificity who has been charged with a criminal offense or where a search was executed. After discussion, the Committee agreed without objection to retain the exemptions as published.

CACM also expressed strong concern that Rule 49.1 as published did not protect the confidentiality of a grand jury foreperson's name, because it exempts charging documents from the redaction requirement. Disclosure of a grand juror's name, CACM noted, was inconsistent with its policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, the policy would require sealing on a case by case basis, which CACM deemed insufficient. In discussing this issue, the Committee noted that the petit jury verdict forms present a similar issue, since they are also signed by the foreperson.

The Committee considered an amendment to the published rule that would have redacted the foreperson's name and substituted that person's initials. After extended discussion of the problems posed by requiring redaction, the Committee concluded that the rule should be recommended to the Judicial Conference as published, though the concerns raised by CACM may warrant further study. Several considerations weighed against requiring redaction at this time. Some of the concerns were practical in nature, given the importance of having an original signed version of the documents initiating a criminal prosecution and recording the verdict in the public record. Although it might be possible to have two versions of these documents, one signed and filed under seal and the other merely initialed and filed in the public record, it was unclear exactly how that would work. Moreover, that procedure had not been the subject of notice and public comment. Committee members also expressed concern about an anonymous system of justice. Under Rule 10(a)(1) the court must ensure that the defendant has a copy of the signed grand jury indictment at the time of arraignment. Rule 6(f) provides for the return of a grand jury indictment in open court, and there was support for the view that absent specific findings the public should be entitled to see any document filed in open court. Given the complexity of the issue, the Committee thought that it would be desirable to have a study to determine whether public disclosure of foreperson signatures has caused significant problems before proposing a new rule requiring redaction of every grand jury indictment and every petit jury verdict form.

Finally, the Committee clarified the relationship between the CACM policy statement, which was included in the Committee Note as published, and the rule itself. At Professor Capra's suggestion, the Committee Note was revised to state more clearly that when the rule itself does not exempt the materials listed in the CACM policy statement from disclosure, privacy and law enforcement concerns are to be accommodated through the sealing and protective order provisions of the rule.

Professor Capra also asked the Committee to give the chair and reporter the authority to work with their counterparts on the other advisory committees to work out any last-minute wording issues and to bring all of the e-government rules into agreement as far as possible.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be approved, as modified after public comment, and forwarded to the Judicial Conference.

IV. Action Items–Recommendations to Publish Amendments to the Rules

1. Rule 29, Motion for a Judgment of Acquittal; Proposed Amendment Concerning Deferral of Rulings.

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. By a narrow vote of 6-5 the Committee voted to recommend publication of an amendment to Rule 29 that would eliminate such unreviewable rulings. The current proposal has an unusually long history that this report will review briefly before turning to recent developments.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

Following this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that substantial revisions in the proposed amendment would be necessary. The proposed amendment was redrafted and subsequent versions were presented and discussed at the Committee's meetings in October 2005 and April 2006.

The current proposal. The Committee considered but ultimately rejected the option of prohibiting preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The amendment addresses the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule seeks to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts).

The 6-5 vote by the Committee reflects serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. Indeed the language of the amendment, which has been refined over the course of numerous meetings, was approved without objection by the Committee at the April 2006 meeting. The discussion at the Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the

continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

After hearing the Department's presentation in January 2005 the Standing Committee asked the Advisory Committee to draft an amendment that would respond to the Department's concerns and to advise the Standing Committee on the desirability of adopting such an amendment. The attached proposal reflects a consensus on the best way to amend Rule 29 if preverdict acquittals are to be restricted to allow the government to challenge them on appeal. The Committee, however, is divided nearly evenly on the desirability of such an amendment at the present time.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

2. Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment was initiated by the Department of Justice. It responds to a problem that the Department has encountered when federal prosecutors work with the State Department Bureau of Diplomatic Security to investigate and prosecute cases involving corruption in United States embassies and consulates around the world. Many cases involved allegations that corrupt consular officials and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa. These crimes take place overseas, and often the most important evidence is located in the offices or residences associated with the consulate or embassy. These problems have arisen in cases involving embassies and consulates in many countries and in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are within U.S. control, they are not located within any State or U.S. judicial district.

As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F. Supp. 2d 878, 882 (W.D. La. 2001) ("clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti.") Although the USA PATRIOT Act amended Rule 41(b) to provide magistrate judges with the authority to issue warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

The language of the proposed amendment was based upon Rule 41(b)(3), which was added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities

related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, however, is limited to property within any of the following:

(1) a territory, possession, or commonwealth of the United States;

(2) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or

(3) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control.

The Committee was advised by the Department of Justice that the proposed amendment had been subject to extensive review by agencies such as the Department of State and the Office of Management and Budget. Its scope was deliberately kept narrow to avoid any thorny international issues. It addresses search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The Department's presentation regarding the need for an amendment was persuasive. The Committee discussion focused on the means of providing the requested authority. One question was whether the Department should seek legislation rather than an amendment of the rules. Because the issues involved only forum, and not jurisdiction, the Department believed it was appropriate to come first to the Rules Committee. The magistrate judge member of the Committee expressed some concern that the proposal might unintentionally create a hierarchy or distinction among federal magistrate judges, by giving greater authority to the three magistrate judges seated in the District of Columbia. It was noted, however, that Congress has already created a functional distinction by vesting the District of Columbia with default jurisdiction over several categories of international and extraterritorial matters.

The Committee voted 10-1 to approve the amendment to Rule 41(b). Because no committee note had yet been prepared, the Committee agreed to consider and vote on the note by e-mail. On May 12, the draft note was circulated for comment. No member of the Committee requested changes

or a telephone conference, so the Committee was asked to vote on the Committee Note by e-mail. All members of the Committee approved the Note by e-mail.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be published for public comment.

3. Time-Computation Template

Judge Kravitz briefed the Committee on the time-computation template, which abolishes the "10 day rule" and adopts the "days are days" principle. He also described in more detail the principles governing the template, and the issues still under consideration by his subcommittee. He explained that the Time-Computation Subcommittee hoped that all of the advisory committees would approve the template at their spring meetings, paving the way for the template to be presented to the Standing Committee at its June meeting. Then each of the advisory committees could begin to adapt the template to their own deadlines.

Following that briefing, the Committee approved the time-computation template for eventual publication in tandem with proposed amendments to the relevant rules of procedure.

Recommendation–The Advisory Committee recommends that the proposed time-computation template be approved for later publication.

V. Information Items

Four subjects discussed at the April 2006 meeting will be major items on the Committee's future agenda, and may eventually reach the Standing Committee.

A. Information Item–Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

Since October 2003, the Committee has been considering a proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The Department of Justice has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. This proposal has been discussed at length by a subcommittee and at six meetings of the full Committee. At the Committee's April 2005 meeting, the Committee first voted 8 to 3 in favor of proceeding with an amendment to Rule 16 and then returned the matter to the subcommittee for additional work on the language of the proposed amendment.

While participating fully in efforts to draft the language of a proposed amendment, the Department of Justice also undertook efforts to develop a revision of the United States Attorneys'

Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted a revised draft for discussion at the Committee's April 2006 meeting.

The Committee discussed at length the draft amendment to the USAM and the Department's suggestion that it be could be adopted as an alternative to a rule change. Some of the comments were directed to the wording of the proposed revision of the USAM, which some committee members felt were vague, hortatory, and subject to many exceptions. It was also noted that there would be no way, under the proposal, to determine in a given case whether the government had made the broad disclosure envisioned by the hortatory language of the rule. Other comments addressed the question whether a revision of the USAM could be a satisfactory substitute for a rules change. More fundamentally, proponents of a rules change noted that the provisions of the USAM are not judicially enforceable, and they also stressed the importance of having a judge, rather than a prosecutor, determine whether disclosure of exculpatory or impeaching material is warranted in a given case.

On the other hand, Department of Justice stressed that an amendment to the USAM could encourage the early disclosure to the defense of exculpatory and impeachment evidence and promote prosecutorial uniformity and regularity nationwide. The exceptions to disclosure were necessary to protect witnesses and national security. The Department of Justice will vigorously oppose the proposed amendment to Rule 16 at the Standing Committee and beyond.

Some members felt that the Committee should welcome the proposed amendment of the USAM and afford it time to work, recognizing that an amendment to Rule 16 could be pursued, if necessary, at a later date. Others felt that the Committee should not lose the benefit of the three years of work that have gone into the proposed amendment, which they viewed as both vitally important and ready for submission to the Standing Committee. One member of the Committee noted that he would be prepared to support the proposal that a revision of the USAM serve as an alternative to a rule change, but only if the draft USAM amendment were revised to eliminate the materiality test and to provide notice in each case of the degree of disclosure afforded.

On a motion to table the proposed amendment to Rule 16 until the October 2006 meeting, the Committee's original vote was split 6 to 6. As chair, Judge Bucklew broke the tie, voting in favor of tabling the amendment. It was noted, however, that two key subcommittee members who had worked on the proposed amendment for three years would complete their terms and be unable to participate in the Committee's next meeting in October 2006. Accordingly, after further discussion, the Committee agreed to table the proposed Rule 16 amendment until a special session of the Committee could be convened on or before September 30, 2006.

B. Other Information Items.

The Committee now has under consideration several issues that are likely to yield proposals that will be brought to the Standing Committee.

1. A subcommittee is reviewing the provisions of Rule 41 dealing with search warrants for computerized and digital data.

2. A subcommittee is reviewing proposals from the Department of Justice for amendments to the rules governing criminal forfeiture.

3. A subcommittee is reviewing proposals by the Department of Justice to amend the rules of criminal procedure to restrict the use of ancient writs, and to amend the rules governing actions under Sections 2254 and 2255 by prescribing the time for motions for reconsideration in those actions.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

1 * * * * *

2 **(b) Considering and Accepting a Guilty or Nolo**
3 **Contendere Plea.**

4 **(1)** ***Advising and Questioning the Defendant.*** Before
5 the court accepts a plea of guilty or nolo contendere,
6 the defendant may be placed under oath, and the
7 court must address the defendant personally in open
8 court. During this address, the court must inform the
9 defendant of, and determine that the defendant
10 understands, the following:

11 * * * * *

12 (M) in determining a sentence, the court's obligation
13 to calculate the applicable sentencing-guideline
14 range apply ~~the Sentencing Guidelines, and the~~

---

*New material is underlined; matter to be omitted is lined through.

15 ~~court's discretion to depart from those~~

16 ~~guidelines under some circumstances~~ and to

17 consider that range, possible departures under

18 the Sentencing Guidelines, and other sentencing

19 factors under 18 U.S.C. § 3553(a); and

20 * * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

The Committee intends the advice to defendants to describe the manner in which courts determine sentences. Ordinarily the court must calculate the applicable guideline range. However, as was true prior to *Booker*, it may in some cases be unnecessary to resolve a

particular guideline issue. *See United States v. Crosby*, 397 F.3d 103, 111-12 (2nd Cir. 2005).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. Two changes were made to the Committee note. First, the reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*. Second, the last paragraph of the Note was added to acknowledge cases such as *Crosby*, which recognize that there are situations in which calculations of certain guidelines issues is not required.

SUMMARY OF PUBLIC COMMENTS

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the proposed advice to the defendant at the time of a plea misstates the effect of the *Booker* decision by "strongly indicat[ing] that the Guidelines are the primary sentencing principle," and thus not "provid[ing] meaningful or accurate information to defendants about the potential penalties they face." Instead, the court should either advise the defendant of all of the sentencing factors under 18 U.S.C. § 3553(a), or alternatively Rule 11(b)(1)(M) should be stricken.

In addition, Mr. Sands suggested the deletion from the Committee Note to Rule 11 and the other *Booker* rules of any

reference to the Fifth Amendment requirement of proof beyond a reasonable doubt, which he believes was not at issue in *Booker*.

The National Association of Criminal Defense Lawyers (05-CR-20) agrees that Rule 11 must be amended in light of *Booker*, but NACDL but argues that the change "does more than is required, and thus more than is appropriate." Instead of any reference to the guidelines, departures, and other sentencing factors, the rule should revert to its pre-guideline form and merely require the court to advise the defendant of the maximum penalty, whether any penalty is mandatory, and that the actual sentence cannot be predicted or promised. No more should be attempted. The proposed language is "misleading" and it "inappropriately" singles out the guidelines range and possible departures as factors the court must consider, "plainly implying these are of greater importance" than other factors under 18 U.S.C. § 3553(a), which are treated as an "afterthought." This seems to "inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-*Booker* sentencing system." NACDL argues that this is substantive--not procedural--issue.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) notes that the proposed amendment "tracks the three-step approach to sentencing that the Commission believes is implicit in *Booker*," and suggests changing the word "calculate" to "determine and calculate" to "better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable sentencing range."

Rule 32. Sentence and Judgment

1 * * * * *

2 **(d) Presentence Report.**

3 **(1)** ***Applying the Advisory Sentencing Guidelines.*** The

4 presentence report must:

5 (A) identify all applicable guidelines and policy

6 statements of the Sentencing Commission;

7 (B) calculate the defendant's offense level and

8 criminal history category;

9 (C) state the resulting sentencing range and kinds of

10 sentences available;

11 (D) identify any factor relevant to:

12 (i) the appropriate kind of sentence, or

13 (ii) the appropriate sentence within the

14 applicable sentencing range; and

15 (E) identify any basis for departing from the

16 applicable sentencing range.

17 **(2)** ***Additional Information.*** The presentence report
18 must also contain the following information:
19 (A) the defendant's history and characteristics,
20 including:
21 (i) any prior criminal record;
22 (ii) the defendant's financial condition; and
23 (iii) any circumstances affecting the defendant's
24 behavior that may be helpful in imposing
25 sentence or in correctional treatment;
26 (B) verified information, stated in a
27 nonargumentative style, that assesses the
28 financial, social, psychological, and medical
29 impact on any individual against whom the
30 offense has been committed;
31 (C) when appropriate, the nature and extent of
32 nonprison programs and resources available to
33 the defendant;

34 (D) when the law provides for restitution,
35 information sufficient for a restitution order;
36 (E) if the court orders a study under 18 U.S.C.
37 § 3552(b), any resulting report and
38 recommendation; and
39 (F) any other information that the court requires,
40 including information relevant to the factors
41 under 18 U.S.C. § 3553(a).
42 * * * * *
43 **(h) Notice of ~~Possible Departure From Sentencing~~**
44 **~~Guidelines~~Intent to Consider Other Sentencing**
45 **Factors. Notice of ~~Possible Departure From~~**
46 **~~Sentencing Guidelines~~Intent to Consider Other**
47 **Sentencing Factors.** Before the court may ~~depart from~~
48 ~~the applicable sentencing range~~ rely on a ground not
49 identified for departure or a non-guideline sentence either
50 in the presentence report or in a party's prehearing

51 submission, the court must give the parties reasonable
52 notice that it is contemplating either departing from the
53 applicable guideline range or imposing a non-guideline
54 sentence ~~such a departure~~. The notice must specify any
55 ground not earlier identified for departing or imposing a
56 non-guideline sentence on which the court is
57 contemplating imposing such a sentence ~~a departure~~.
58 * * * * *

COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information

affecting all cases or a class of cases, or by an individual judge in a particular case.

Subdivision (h). The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term

"variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of subdivisions (d) and (h) in response to public comments and withdrew subdivision (k) because of new legislation that preempted it. In subdivision (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. In subdivision (h), the Committee responded to numerous comments that exposed ambiguity in the published rule. The Committee adopted the Sentencing Commission's suggested revision to clarify the scope of the requirement that the sentencing court give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here--as in the other *Booker* rules--the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 32

Comments regarding subdivision (d)

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the amendment to Rule 32(d)(2)(F) should require Probation Officers to collect all information relevant to each of the sentencing factors under 18 U.S.C. § 3553(a). He recommends that these factors be enumerated in Rule 32(d), and that Rule 32(f)(1) be amended to facilitate the collection. Finally, he recommends that the heading of subparagraph (d)(1) be amended to read "Calculating the Advisory Sentencing Guidelines."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the amendment does not go far enough in responding to *Booker*, which "commands a fundamental change ... with respect to the information the court must consider in determining the sentence, and the importance of that information." The structure of the current rule "reflects the primacy the guidelines had prior to *Booker*," and by retaining that structure the amendment "will misleadingly convey and wrongly encourage the continued primacy of the guidelines...." The rule should be revised to address individually all of the factors specified under 18 U.S.C. § 3553(a). The terminology of the rule also requires or encourages special consideration of the guidelines. Alternative terminology might include referring to a sentence outside the guideline range as an "individualized sentence."

Comments regarding subdivision (h)

Chief U.S. Probation Officer Tony Garoppolo (05-CR-002) reads the proposed amendment to Rule 32(h) broadly, and objects that it "effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing; he also notes that the term "departure" is outdated in light of the *Booker* decision and suggests the use of the phrase "non-guidelines sentence."

The Honorable Stewart Dalzell (05-CR-006) reads the amendment to Rule 32(h) broadly and expresses "strong opposition" on the ground that *Booker* requires the courts to consider all of the factors under 18 U.S.C. § 3553(a) in every case. In his view the amendment would delay the consideration of these factors and require a second sentencing hearing in most cases.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) supports the goal of the amendment, but expresses concern that the proposed language "may be overly broad and not fully comport with the spirit and intent of Rule 32(h)." The Commission suggests the modification of the language to clarify that the notice requirement applies only when the court contemplates a sentence based upon a ground "not earlier identified for departing or imposing a non-guideline sentence...."

The National Association of Criminal Defense Lawyers (05-CR-020) objects that the amendment "perpetuates the primacy of the guidelines" and "wrongly limits the circumstances in which notice is required." References to "departing" and "non-guideline sentence" should be eliminated. It would be preferable to refer to "Guideline" and "individualized" sentences.

Comments regarding subdivision (k)

Because the amendment to subdivision (k) has been withdrawn, these comments have been omitted.

Rule 35. Correcting or Reducing a Sentence

1 * * * * *

2 **(b) Reducing a Sentence for Substantial Assistance.**

3 **(1)** ***In General.*** Upon the government's motion made

4 within one year of sentencing, the court may reduce

5 a sentence if: the defendant, after sentencing,

6 provided substantial assistance in investigating or

7 prosecuting another person.

8 ~~(A) the defendant, after sentencing, provided~~

9 ~~substantial assistance in investigating or~~

10 ~~prosecuting another person; and~~

11 ~~(B) reducing the sentence accords with the~~

12 ~~Sentencing Commission's guidelines and policy~~

13 ~~statements.~~

14 * * * * *

COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here--as in the other *Booker* rules--the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 35

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) recognizes that the purpose of the amendment is to

delete a reference to the mandatory application of the Guidelines post *Booker*, but it believes that the amended rule "should reflect the continued requirement that courts consult and consider guidelines and policy statements before making any such sentence reduction." The Commission also notes that there is a "substantial legal question" whether the *Booker* remedial opinion is applicable in the post-sentencing context. The Commission supports an addition to the Committee Note to clarify that "the changes were not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the proposed amendment is "largely right." However, now that the guidelines are not mandatory, "it is no longer appropriate that the rule require that the motion be made by an attorney for the government." As a policy matter, a sincere effort at cooperation may be "powerful evidence of rehabilitation" that should be considered under 18 U.S.C. § 3553(a) even in the absence of a government motion.

Rule 45. Computing and Extending Time

1 * * * * *

2 **(c) Additional Time After Certain Kinds of Service.**

3 ~~When these rules permit or require~~ Whenever a party

4 must or may ~~to~~ act within a specified period after ~~a notice~~

5 ~~or a paper has been served on that party~~ service and

6 service is made in the manner provided under Federal

7 Rule of Civil Procedure 5(b)(2)(B), ©, or (D), 3 days are

8 added after ~~to~~ the period would otherwise expire under

9 subdivision (a) ~~if service occurs in the manner provided~~

10 ~~under Federal Rule of Civil Procedure 5(b)(2)(B), ©, or~~

11 ~~(D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in

counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

SUMMARY OF PUBLIC COMMENTS ON RULE 45

The National Association of Criminal Defense Lawyers (05-CR-020) thanked the Committee for the clarification of a rule that had "occasionally vexed and confused the most dedicated practitioner."

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 49.1. Privacy Protection For Filings Made with the Court

1 **(a) Redacted Filings.** Unless the court orders otherwise, in
2 an electronic or paper filing with the court that contains
3 a social-security number, taxpayer-identification number,
4 or birth date, the name of an individual known to be a
5 minor, a financial-account number, or the home address
6 of an individual, a party or non-party making the filing
7 may include only:
8 **(1)** the last four digits of a social-security number and
9 taxpayer-identification number;
10 **(2)** the year of the individual's birth;
11 **(3)** a minor's initials;
12 **(4)** the last four digits of a financial-account number;
13 and

*New material is underlined; matter to be omitted is lined through.

14 **(5)** the city and state of a home address.

15 **(b) Exemptions from the Redaction Requirement.** The
16 redaction requirement does not apply to the following:

17 **(1)** a financial-account number or real property address
18 that identifies the property allegedly subject to
19 forfeiture in a forfeiture proceeding;

20 **(2)** the record of an administrative or agency
21 proceeding;

22 **(3)** the official record of a state-court proceeding;

23 **(4)** the record of a court or tribunal, if that record was
24 not subject to the redaction requirement when
25 originally filed;

26 **(5)** a filing covered by Rule 49.1(d);

27 **(6)** a pro se filing in an action brought under 28 U.S.C.
28 §§ 2241, 2254, or 2255;

29 **(7)** a court filing that is related to a criminal matter or
30 investigation and that is prepared before the filing of

31 a criminal charge or is not filed as part of any
32 docketed criminal case;
33 **(8)** an arrest or search warrant; and
34 **(9)** a charging document and an affidavit filed in
35 support of any charging document.
36 **(c) Immigration Cases.** A filing in an action brought under
37 28 U.S.C. § 2241 that relates to the petitioner's
38 immigration rights is governed by Federal Rule of Civil
39 Procedure 5.2.
40 **(d) Filings Made Under Seal.** The court may order that a
41 filing be made under seal without redaction. The court
42 may later unseal the filing or order the person who made
43 the filing to file a redacted version for the public record.
44 **(e) Protective Orders.** For good cause, the court may by
45 order in a case:
46 **(1)** require redaction of additional information; or

47 **(2)** limit or prohibit a non-party's remote electronic
48 access to a document filed with the court.

49 **(f) Option for Additional Unredacted Filing Under Seal.**
50 A person making a redacted filing may also file an
51 unredacted copy under seal. The court must retain the
52 unredacted copy as part of the record.

53 **(g) Option for Filing a Reference List.** A filing that
54 contains redacted information may be filed together with
55 a reference list that identifies each item of redacted
56 information and specifies an appropriate identifier that
57 uniquely corresponds to each item listed. The list must be
58 filed under seal and may be amended as of right. Any
59 reference in the case to a listed identifier will be
60 construed to refer to the corresponding item of
61 information.

62 **(h) Waiver of Protection of Identifiers.** A party waives the
63 protection of Rule 49.1 (a) as to the party's own

64 information by filing it without redaction and not under

65 seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in

individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;

- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the

exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

SUMMARY OF PUBLIC COMMENTS

Bruce Berg (05-CR-001), who represents the pre-employment screening industry, requests that the rule be amended to require that individual's full date of birth and social security number be made part of the public record to facilitate background checks.

Mike Sankey (05-CR-002) presented written testimony and appeared in person to supplement his testimony on behalf of the National Association of Professional Background Screeners, in support of listing the full date of birth for adults in order to assist in criminal history searches for employers.

Jack E. Horsley (05-CR-006) suggests that the employee number of a person who is state or federal employee be exempt from redaction.

Mark Golden (05-CR-010), writing on behalf of the National Court Reporters Association, applauds the advisory committees' efforts to address the privacy and security issues and proposes that language be added to make clear that the duty to redact information in filings rests solely with the parties.

The Honorable John R. Tunheim, on behalf of CACM (05-CR-011), expressed concern about several points. (1) The language in all e-rules referring to the record of a court "whose decision is being reviewed" may cause problems in bankruptcy. (2) Rule 49.1's list of exemptions from redaction is unnecessarily broad, because it would be sufficient to redact personal identifiers from habeas filings, a filing in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case, arrest or search warrants, and charging documents or affidavits in support thereof. (3) If the Rule

does not require redaction of the grand jury foreperson's name, CACM opposes the rule. (4) The relationship between the CACM guidance and the new rule is not clear.

The Honorable William G. Young (05-CR-012) suggests that the portion of the Criminal (and Civil) Committee Note concerning trial exhibits is ambiguous because it is unclear when they are "filed with the court" and hence subject to redaction. He also believes that allowing the filing of an unredacted document under seal is unwise, though he recognized that it is based in haec verba on the E-Government Act. Finally, he raises several issues regarding the redaction required by CACM's guidelines. Will redaction of residential street addresses from jury lists raise any constitutional concerns? Who will do that redaction? Are the CACM guidelines for transcript preparation so complex that they will unduly delay appellate proceedings?

Peter A. Winn (05-CR-014) believes the rules successfully balance the right of public access to court records against the need to prevent the misuse of sensitive personal and commercial information and implement the congressional directive to make court records available online; however, he recommends the use of the PACER system to create an intermediate system of courthouse only access, rather than achieving such intermediate access by protective orders.

Gregory A. Beck, Public Citizen Litigation Group (05-CR-15) expresses concern that allowing the court to order that a filing be made under seal without redaction will be interpreted--notwithstanding the committee note--to expand the authority to seal and thereby restrict public access to court records. He proposes that provision authorizing the filing of unredacted documents under seal be stricken from each of the e-government rules or limited by the phrase "as authorized by law."

Chris Jay Hoofnagle on behalf of the Electronic Privacy Information Center (05-CR-016) supports revisions to protect personal information by (1) minimization of the collection of personal information in court records, (2) further limiting access at the courthouse, (3) limitations on disclosure only for permitted uses, (4) reduction in unique identifiers, including the redaction of all digits of Social Security numbers, home addresses, telephone numbers, and mother's maiden names, (5) limitation on bulk downloads for commercial solicitations or profiling.

Peter D. Keisler on behalf of the Department of Justice (05-CR-018) recommends a clarification of the forfeiture exemption from redaction by reordering the clauses to make clear that parties may litigate regarding specific property without redaction in ancillary proceedings as well as in the main forfeiture proceeding.

The Reporters Committee for Freedom of the Press (05-CR-019) emphasizes the press's strong interest in the accessibility of all types of information in court records; it (1) opposes the redaction of years of birth and minors names from the right of public access, (2) proposes that the court have authority to unseal redacted information in the public interest, and (3) requests clarification of the standard for sealing filings and entering protective orders.

National Association of Criminal Defense Lawyers (05-CR-020) recommends that the exemption of habeas corpus and 2255 actions from the redaction requirements be replaced with a provision encourages–but does not require–pro se litigants to comply with the redaction requirements in all their filings, or in their habeas and 2255 filings.

7-B

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

1 **(a) Time for a Motion.**

2 (1) ***Before Submission to the Jury.*** After the
3 government closes its evidence or after the close of
4 all the evidence, ~~the court on the defendant's motion~~
5 ~~must enter a judgment of acquittal of any offense for~~
6 ~~which the evidence is insufficient to sustain a~~
7 ~~conviction. The court may on its own consider~~
8 ~~whether the evidence is insufficient to sustain a~~
9 ~~conviction. If the court denies a motion for a~~
10 ~~judgment of acquittal at the close of the~~
11 ~~government's evidence, the defendant may offer~~
12 ~~evidence without having reserved the right to do so.~~
13 a defendant may move for a judgment of acquittal on
14 any offense. The court may invite the motion.

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*New material is underlined; matter to be omitted is lined through.

15 (2) ***After a Guilty Verdict or a Jury's Discharge.*** A
16 defendant may move for a judgment of acquittal, or
17 renew such a motion, within 7 days after a guilty
18 verdict or after the court discharges the jury,
19 whichever is later. A defendant may make the
20 motion even without having made it before the court
21 submitted the case to the jury.
22 (b) **Ruling on a Motion Made Before Verdict**. If a
23 defendant moves for a judgment of acquittal before the
24 jury reaches a verdict (or after the court discharges the
25 jury before verdict), the following procedures apply:
26 (1) ***Denying Motion or Reserving Decision.*** The court
27 may deny the motion or may reserve decision on the
28 motion until after a verdict. If the court reserves
29 decision, it must decide the motion on the basis of
30 the evidence at the time the ruling was reserved. The
31 court must set aside a guilty verdict and enter a

32 judgment of acquittal on any offense for which the
33 evidence is insufficient to sustain a conviction.
34 (2) ***Granting Motion; Waiver.*** The court may not grant
35 the motion before the jury returns a verdict (or
36 before the verdict in any retrial in the case of
37 discharge) unless:
38 (A) the court informs the defendant personally in
39 open court and determines that the defendant
40 understands that:
41 (i) the court can grant the motion before the
42 verdict only if the defendant agrees that the
43 government can appeal that ruling; and
44 (ii) if that ruling is reversed, the defendant
45 could be retried; and
46 (B) the defendant in open court personally waives
47 the right to prevent the government from
48 appealing a judgment of acquittal (and retrying

49 the defendant on the offense) for any offense for
50 which the court grants a judgment of acquittal
51 before the verdict.
52 **(c) Ruling on a Motion Made After Verdict.** If a
53 defendant moves for a judgment of acquittal after the jury
54 has returned a guilty verdict, the court must set aside the
55 verdict and enter a judgment of acquittal on any offense
56 for which the evidence is insufficient to sustain a
57 conviction.
58 ~~**(b) Reserving Decision.** The court may reserve decision on~~
59 ~~the motion, proceed with the trial (where the motion is~~
60 ~~made before the close of all the evidence), submit the~~
61 ~~case to the jury, and decide the motion either before the~~
62 ~~jury returns a verdict or after it returns a verdict of guilty~~
63 ~~or is discharged without having returned a verdict. If the~~
64 ~~court reserves decision, it must decide the motion on the~~
65 ~~basis of the evidence at the time the ruling was reserved.~~

66 ~~**(c) After Jury Verdict or Discharge.**~~

67 ~~(1) ***Time for a Motion.*** A defendant may move for a~~

68 ~~judgment of acquittal, or renew such a motion,~~

69 ~~within 7 days after a guilty verdict or after the court~~

70 ~~discharges the jury, whichever is later.~~

71 ~~(2) ***Ruling on the Motion.*** If the jury has returned a~~

72 ~~guilty verdict, the court may set aside the verdict and~~

73 ~~enter an acquittal. If the jury has failed to return a~~

74 ~~verdict, the court may enter a judgment of acquittal.~~

75 ~~(3) ***No Prior Motion Required.*** A defendant is not~~

76 ~~required to move for a judgment of acquittal before~~

77 ~~the court submits the case to the jury as a~~

78 ~~prerequisite for making such a motion after jury~~

79 ~~discharge.~~

COMMITTEE NOTE

Subdivisions (a), (b), and (c). The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to

grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429

U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences"). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand, United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

Rule 41. Search and Seizure

1 **(b) Authority to Issue a Warrant.** At the request of a
2 federal law enforcement officer or an attorney for the
3 government:

4 * * * * *

5 (5) a magistrate judge having authority in any district in
6 which activities related to the crime under
7 investigation may have occurred, or in the District of
8 Columbia, may issue a warrant for property that is
9 located outside the jurisdiction of any State or
10 district, but within any of the following:
11 (A) a territory, possession, or commonwealth of the
12 United States;
13 (B) the premises of a United States diplomatic or
14 consular mission in a foreign state, and the
15 buildings, parts of buildings, and land
16 appurtenant or ancillary thereto, used for

17 purposes of the mission, irrespective of

18 ownership; or

19 (C) residences, and the land appurtenant or ancillary

20 thereto, owned or leased by the United States,

21 and used by United States personnel assigned to

22 United States diplomatic or consular missions

23 in foreign states.

COMMITTEE NOTE

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

7-C

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 3 & 4, 2006
Washington, D.C.

I. ATTENDANCE AND OPENING REMARKS

The Judicial Conference Advisory Committee on the Rules of Criminal Procedure (the "committee") met in Washington, D.C., on April 3-4, 2006. The following members were present:

Judge Susan C. Bucklew, Chair
Judge Richard C. Tallman
Judge David G. Trager
Judge Harvey Bartle, III
Judge James P. Jones
Judge Mark L. Wolf
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
Thomas P. McNamara, Esquire
Assistant Attorney General Alice S. Fisher (ex officio)
Professor Sara Sun Beale, Reporter

Also participating in all or part of the meeting were:

Judge David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Judge Mark R. Kravitz, Standing Committee Liaison to the Criminal Rules Committee
Judge Paul L. Friedman, Former Committee Member
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Paul J. McNulty, Deputy Attorney General
Benton J. Campbell, Counselor to the Assistant Attorney General
Jonathan J. Wroblewski, Counsel, United States Department of Justice
Peter G. McCabe, Rules Committee Secretary and Administrative Office Assistant Director
John K. Rabiej, Chief of the Rules Committee Support Office at the Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Jeffrey N. Barr, Senior Attorney at the Administrative Office

Timothy K. Dole, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate at the Federal Judicial Center

Judge Bucklew noted that the terms of three committee members were expiring on September 30, 2006: Judge Trager, Mr. Goldberg, and Mr. Fiske. Also, she welcomed former committee member Judge Friedman, who chaired the *Booker* Subcommittee during his tenure.

II. APPROVAL OF MINUTES

Judge Tallman moved for approval of the draft minutes of the committee's October 24-25, 2005 meeting in Santa Rosa, California.

The committee without objection approved the minutes of the October 2005 meeting.

III. STATUS OF MATTERS PENDING BEFORE CONGRESS AND PROPOSED AMENDMENTS

A. Report From the Chief of the Rules Committee Support Office

Mr. Rabiej reported that the Supreme Court had approved all rule amendments submitted and that they would be physically delivered to Congress shortly. The criminal rule amendments include:

1. Rule 5. Initial Appearance. The amendment permits transmission of documents by reliable electronic means.

2. Rule 6. The Grand Jury. The amendment is technical and conforming.

3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The amendment permits transmission of documents by reliable electronic means.

4. Rule 40. Arrest for Failing to Appear in Another District. The amendment authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who fails to appear or violates any other condition of release.

5. Rule 41. Search and Seizure. The amendment permits transmission of documents by reliable electronic means and sets forth procedures for issuing tracking-device warrants.

6. Rule 58. Petty Offenses and Other Misdemeanors. The amendment resolves a conflict with Rule 5.1 concerning a defendant's right to a preliminary hearing.

B. Proposed Crime Victims' Rights Act Amendments Approved by Standing Committee for Publication in 2006

Judge Bucklew reported that the Standing Committee had approved for publication the following rule amendments, designed to implement the Crime Victims' Rights Act (CVRA):

1. Rule 1. Scope; Definitions. The proposed amendment defines "victim."

2. Rule 12.1. Notice of Alibi Defense. The proposed amendment governs the circumstances under which a victim's address and telephone number is disclosed to the defense.

3. Rule 17. Subpoena. The proposed amendment requires judicial approval before service of a post-indictment subpoena seeking personal or confidential victim information from a third party and provides a mechanism for victim notification.

4. Rule 18. Place of Trial. The proposed amendment requires the court to consider victim convenience in setting the place for trial within the district.

5. Rule 32. Sentencing and Judgment. The proposed amendment deletes definitions of victim and crime of violence to conform to other amendments, clarifies when a presentence report should include restitution-related information, clarifies the standard for inclusion of victim impact information in a presentence report, and provides that victims have a right "to be reasonably heard" in certain proceedings.

6. Rule 60. Victim's Rights. The proposed new rule provides a victim the right to be notified, to attend public proceedings, and to be heard, and sets limits on relief.

Judge Bucklew reported that the CVRA-related proposed rule amendments had been discussed at length at the Standing Committee's January meeting. Because proposed Rule 43.1 bears no relation to Rule 43, it was redesignated as Rule 60. Professor Beale noted that the Standing Committee's changes had been generally stylistic. One substantive issue raised in the discussion, however, was whether the presumption in Rule 12.1 should be reversed to require disclosure of a victim's address and phone number to the defense unless the court orders otherwise. The issue will be highlighted for public comment.

Judge Bucklew invited discussion of a suggestion by the Standing Committee that the committee consider adding the following provision to Rule 51, to reflect 18 U.S.C. § 3771(d)(4):

(c) Government Assertion of Victim's Right. In any appeal in a criminal case, the government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

Professor Beale noted that this was part of the broader question of how much substantive statutory content should be imported into the rules. Judge Tallman questioned whether a procedural rule should include a provision whose remedy would presumably be substantive: having the judgment and conviction vacated and the case remanded. Mr. Campbell stated that the Department considered the addition unnecessary. Professor Beale noted that the provision primarily affected the government, which was well aware of its statutory rights. Judge Jones moved that the committee not recommend publishing the proposed Rule 51(c). Professor King said that she thought that the proposed rule should be an appellate rather than a criminal rule, because it involves assertion of error on appeal. Professor Beale suggested referring the rule to the Appellate Rules Committee.

The committee voted not to send proposed Rule 51(c) to the Standing Committee.

C. Proposed Amendments Published for Public Comment

Judge Bucklew noted that comments were received on the following proposed amendments:

1. Rule 11. Pleas. The proposed amendment would conform the rule to *United States v. Booker*, 543 U.S. 220 (2005), by revising the court's advice to a defendant during the plea colloquy to reflect the advisory nature of the Sentencing Guidelines.

2. Rule 32. Sentencing and Judgment. The proposed amendment would conform the rule to *Booker* by (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not previously identified; and (3) requiring the court to enter judgment on a special form prescribed by the Judicial Conference.

3. Rule 35. Correcting or Reducing a Sentence. The proposed amendment would conform the rule to *Booker* by deleting subparagraph (B) and specifying that the Sentencing Guidelines are advisory rather than mandatory.

4. Rule 45. Computing and Extending Time. The proposed amendment clarifies how to calculate the additional three days given a party to respond when service is made by mail, leaving it with the clerk of court, or by electronic means under Civil Rule 5(b)(2)(B), (C), or (D).

5. Rule 49.1. Privacy Protection For Filings Made with the Court. The proposed new rule implements section 205(c)(3) of the E-Government Act of 2002, which requires the judiciary to promulgate federal rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

The committee discussed the public comments received on the proposed amendment of Rule 11, which governs the court's advice to a defendant during a plea colloquy. Professor Beale noted that the United States Sentencing Commission had recommended replacing "calculate" with the phrase "determine and calculate" in subparagraph (b)(1)(M) to give defendants a clearer picture of the judge's role in sentencing. Other comments suggested that the proposed amendment accorded the Sentencing Guidelines greater prominence than warranted under *Booker* and insufficiently emphasized the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). Professor Beale noted that she agreed with the suggestion of the Federal and Community Defenders that references to the Fifth Amendment requirement of proof beyond a reasonable doubt in the committee notes accompanying the CVRA-related proposed rule amendments should be deleted, because the Supreme Court rested its holding in *Booker* solely upon the Sixth Amendment.

Several committee members expressed concern that the proposed Rule 11 amendment appeared to require the judge to calculate the applicable sentencing-guidelines range even when doing so was unnecessary, such as when the range was clearly trumped by an applicable mandatory minimum. Judge Bartle suggested accommodating these situations by replacing "calculate" with the term "consider." But Ms. Fisher responded that "consider" would be too vague. Judge Trager suggested referring to "the court's obligation ordinarily to calculate the applicable sentencing-guideline range." Several members suggested that the qualifier "ordinarily" would be unhelpful and confusing to defendants. Following an extensive discussion and two initial votes, Ms. Fisher moved to send the proposed amendment to the Standing Committee as revised by Professor Beale (i.e., without the Fifth Amendment reference in the note), but retaining the phrase "the court's obligation to calculate," as originally published. Judge Wolf expressed concern that the proposed amendment might be misconstrued as undermining such post-*Booker* decisions as *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Ms. Fisher said that the Department would not object to acknowledging *Crosby* in the note.

***The committee voted 9-3 to send the proposed Rule 11(b)(1)(M) amendment to the Standing Committee as published, except for two changes to the note: deletion of the reference to the Fifth Amendment and the addition of a reference to* Crosby.**

The committee discussed the proposed Rule 32(d)(1) amendment. Professor Beale suggested adding "Advisory" to the heading to reflect *Booker*: "Applying the Advisory Sentencing Guidelines."

The committee without objection approved the change to the proposed Rule 32(d)(1) amendment.

Professor Beale noted that the public comments received with respect to the published draft of the proposed Rule 32(h) amendment identified several ambiguities. She recommended adopting the changes proposed by the Sentencing Commission and revising the rule to read as follows:

Notice of Intent to Consider Other Sentencing Factors. Before the court may rely on a ground not identified for departure or a non-guidelines sentence either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.

Following a brief discussion of the purposes served by providing counsel with advance notice, Judge Trager moved to adopt the revisions recommended by Professor Beale.

The committee without objection approved the changes to the Rule 32(h) amendment.

Professor Beale noted that recent legislation requiring courts to use the judgment form prescribed by the Judicial Conference may have made the proposed amendment to Rule 32(k) unnecessary. Specifically, § 735 of the USA PATRIOT Improvement and Reauthorization Act amended 28 U.S. C. § 994(w) to require submission to the Sentencing Commission of "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." Mr. Rabiej reported that the amendment had been requested originally by the Criminal Law Committee, but given the new statute, that recommendation had been withdrawn. Professor King moved to withdraw the proposed amendment.

The committee without objection decided to withdraw the Rule 32(k) amendment.

Professor Beale recommended against adopting the changes to the Rule 35 amendment suggested by the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL). The Commission suggested preserving the existing rule's explicit reference to the Sentencing Guidelines and questioned whether the *Booker* remedial opinion applied to post-sentencing proceedings. Meanwhile, NACDL wrote that, following *Booker*, the rule should no longer *require* a government motion, because even in its absence, a sincere effort at cooperation might constitute "powerful evidence of rehabilitation" under 18 U.S.C. § 3553(a).

The committee without objection approved the Rule 35 amendment without change.

Professor Beale noted that the only public comment received on the proposed Rule 45 amendment was from NACDL, which expressed appreciation to the committee for clarifying a rule that has "occasionally vexed and confused the most dedicated practitioner."

The committee without objection approved the Rule 45 amendment.

IV. SUBCOMMITTEE REPORTS

A. Rule 49.1. Proposed E-Government Rule

The committee discussed several changes to the proposed Rule 49.1 draft. Professor Capra, the lead reporter designated by the Standing Committee to coordinate the efforts of the advisory rules committees in developing a uniform E-Government rule, joined the meeting by telephone. Judge Bucklew noted that the E-Government Subcommittee, chaired by Judge Bartle, had met to consider the recently proposed changes, which fell into two categories: (1) changes affecting all E-Government rules; and (2) those affecting only Criminal Rule 49.1.

Professor Beale noted that changes of the first variety included, for instance, a request from the Bankruptcy Rules Committee that all references to "person" be changed to "individual" to distinguish from a different meaning of "person" as defined by a specific Bankruptcy Rule The reporters of the respective committees had additionally agreed to a few other minor style changes.

One proposed change affecting only Criminal Rule 49.1 was the suggestion of the Committee on Court Administration and Case Management (CACM) that subdivision (a) be amended to require redaction of the signed names of individual grand jurors or forepersons, replacing them with their initials. Judge Levi raised concerns about how this proposal would work in practice, noting the legal importance of having an original, unredacted, signed version of these court documents. Judge Bucklew suggested that perhaps a foreperson could sign one form, which could be sealed, then initial a second, public form. Judge Battaglia expressed concern that the change might mean that, at arraignment, the court would no longer provide a defendant with an unredacted copy of the signed grand jury indictment. Judge Jones cautioned against creating an anonymous justice system, as exists in some foreign countries. Judge Wolf suggested that, absent specific findings, the public should be entitled to see any document filed in open court. Judge Bucklew asked whether the proposed change should be published first for public comment. Noting that this is a complicated issue being handled very differently in different districts, Judge Levi suggested that an empirical study might be beneficial to determine as a preliminary matter whether public disclosure of jury foreperson signatures has caused problems sufficient to justify a national rule requiring every court to redact them from every grand jury indictment and every petit jury verdict form.

The committee without objection decided that proposed Rule 49.1 should not require redaction of identifying juror information at this time, pending further study.

Professor Beale noted that the phrase "a party or non party making a filing" had been added to Rule 49.1(a) to make clear that the redaction obligation applies to all filers, not just parties. She also noted the Department of Justice's suggestion, agreed to by the other rules committee reporters, to move the phrase "in a forfeiture proceeding" to the end of paragraph (b)(1) to make clear that the redaction exemption also applies to forfeiture filings in related ancillary proceedings. The revised rule would read as follows: "(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;"

Responding to a concern by CACM that applies most directly to bankruptcy cases, Professor Beale said that all the committee reporters as well as the E-Government Subcommittee had agreed to modify the redaction exemption in paragraph (b)(4) as follows to keep the rules parallel: "the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed." Judge Jones asked whether this change obviated the need to exempt "the official record of a state-court proceeding" in paragraph (b)(3). Professor Capra acknowledged an overlap in the two rules. Professor Beale suggested, however, that this concern might not be worth pursuing at this late stage, given the need to coordinate all template changes across multiple committees.

Professor Beale noted that the words "pro se" had been added to the beginning of Rule 49.1(b)(6) and (b)(7) in the revised draft, thereby excluding from the redaction exemption all filings submitted by counsel in actions brought under 28 U.S. § 2254, § 2255, or § 2241. This change had been proposed by the E-Government Subcommittee chaired by Judge Bartle. Judge Tallman and Judge Jones recommended omitting both (b)(6) and (b)(7) entirely and requiring *all* litigants to redact their filings, as CACM had suggested in its comments, understanding that enforcement could be relaxed in pro se cases as appropriate. Judge Bartle and Professor King objected to this approach, citing potential legal consequences if a pro se petitioner's failure to redact sensitive information violated a rule. Professor Capra noted that the government could always seek a protective order if a pro se filing included unredacted information that raised security concerns.

Judge Bartle asked why the language of subdivision (d) could not parallel (c), thereby according judges greater discretion to determine when a protective order is appropriate. Subdivision (c) begins, "The court may order that a filing be made under seal without redaction." Subdivision (d) provides, "If necessary to protect private or sensitive information that is not otherwise protected under (a), the court may by order in a case . . . ." Professor Beale noted that subdivision (d) sets forth a standard for when protective orders are proper, a compromise between advocates of privacy and advocates of open government. By contrast, she said, the standard for sealing is already well established by case law. Judge Bartle moved that subdivision (d) be revised as follows to reflect the more flexible standard for issuance of protective orders set forth in Civil Rule 26(c):

> "**Protective Orders.** For good cause shown, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a non party's remote electronic access to a document filed with the court."

Professor Capra said he would advise the other rules committees of this change and asked the committee to authorize its chair and reporter to work with the chairs and reporters of the other committees to resolve any last-minute wording issues. Professor Capra noted that the phrase "in a case" in subdivision (d) should be retained to make clear that any protective orders of this nature must be issued on a case-by-case basis, not as a standing order.

The committee without objection approved the change proposed by Judge Bartle and granted the chair and the reporter authority to work with the chairs and the reporters of the other rules committees to resolve any last-minute wording issues in the interest of uniformity.

Professor Beale noted that the committee had given early approval to the redaction exemptions in paragraphs (b)(8), (b)(9), and (b)(10), as requested by the Department of Justice. Mr. Campbell stressed the importance of particularity and identification in such documents as arrest or search warrants and said that the public has a right to know with some specificity who was arrested or charged with a crime and where a search was executed. Judge Bucklew noted that CACM had expressed concern with the breadth of the exemptions. Judge Jones moved to retain the exemptions.

The committee without objection decided to retain the exemptions in proposed Rule 49.1(b) (8), (9), and (10).

Judge Bartle moved that the committee approve the entire text of Rule 49.1 as revised.

The committee without objection approved the revised draft of Rule 49.1.

B. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information

Deputy Attorney General Paul McNulty attended the meeting for the committee's discussion of the proposed Rule 16 amendment. Judge Bucklew noted that, since the committee's last meeting, the Department of Justice had circulated two drafts of a proposed revision to the United States Attorneys' Manual (USAM) as an alternative to amending Rule 16. Ms. Fisher explained that the proposal was designed to address some of the concerns prompting the effort to amend the rule. She said that the revision of the Manual would promote prosecutorial uniformity and regularity nationwide, would allow for early disclosure of exculpatory and impeaching evidence, and would encourage prosecutors in most cases to exceed the disclosure requirements mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Mr. Fiske raised several concerns with the Department's proposed USAM revision and asked whether the USAM revision would require a disclosure regardless of materiality. Ms. Fisher noted that subsection B of the proposed revision to the Manual "encourages prosecutors to take an expansive view of its disclosure obligations and err on the side of broad disclosure without engaging in speculation as to whether the evidence will be material to guilt or the outcome of a trial." Mr. Goldberg pointed out, however, that the proposed revision is merely hortatory and includes broadly defined exceptions. Under the proposal, it would be impossible to determine in a given case whether the government's disclosure of exculpatory and impeaching information was broad or narrow. Mr. Goldberg asked whether the USAM proposal was simply an alternative to a Rule 16 amendment or would be implemented regardless of how the committee chose to proceed.

Ms. Fisher responded that the USAM revision was proposed as an alternative to a rule change. Under its proposed revision standard, prosecutors would continue to weigh materiality before disclosing exculpatory or impeaching evidence, but would be encouraged to construe materiality broadly. She added that exceptions were important to protect witnesses and the national security. Judge Wolf suggested that, where witness safety or national security considerations

required an exception, the Department could simply request a protective order. Ms. Fisher replied that Judge Wolf's concerns could largely be addressed in a further revision of the USAM draft. Mr. Goldberg suggested that a judge rather than a prosecutor should determine whether non-disclosure of exculpatory or impeaching information is warranted in a particular case. He warned that, without the rule amendment, which the committee had been working on for nearly three years, conflicting local rules would emerge. Ms. Fisher suggested that the USAM revision would promote national uniformity and regularity of practice. Mr. McNamara replied that only a rule could accomplish that.

Because the committee voted at the Spring 2005 meeting to amend the rule in concept, Judge Bucklew said that the issue could be revisited only upon the motion of a member who had previously voted to approve the amendment. She noted that the Department had invested significant time in drafting a new USAM section to address some of the committee's concerns and that the Department had indicated that it would vigorously oppose the proposed Rule 16 amendment at the Standing Committee and beyond, if necessary. Judge Tallman recommended against approving a rule that might well be rejected later in the rulemaking process. Rather, he suggested that the committee welcome the proposed USAM addition as incremental progress and afford it some time to work, with the understanding that if it did not, Rule 16 could be amended at some later date.

Mr. Fiske announced that, if the Department were willing to make the two main changes urged by members of the committee — eliminating the materiality test and providing notice of which disclosure standard is being used in each case — he was prepared to support the USAM proposal. It was moved that the proposed rule amendment be tabled until the following meeting. The committee's initial vote was split 6 to 6. As committee chair, Judge Bucklew broke the tie by voting in favor of the motion to table the proposed amendment.

The committee voted 7-6 to table the proposed Rule 16 amendment until the next meeting.

Concern was raised that the terms of Mr. Fiske and Mr. Goldberg, two Rule 16 Subcommittee members who had worked hard on the proposed rule amendment, would expire before the next committee meeting. It was suggested that the committee reconvene again before the expiration of their terms, perhaps by teleconference, to determine (1) whether the Department had added a new U.S. Attorneys' Manual section on disclosure of exculpatory and impeaching information, and (2) whether its wording adequately addressed the main concerns raised by Mr. Fiske and others. Judge Bucklew suggested resolving any wording questions so that the only issue left for the teleconference would be whether to send the proposed rule amendment to the Standing Committee. Following discussion of the changes made to the Rule 16 amendment since the October 2005 meeting, Mr. Fiske moved to table consideration of the Rule 16 amendment proposal until a special session of the committee could be convened on or before September 30, 2006.

The committee without objection decided to table the proposed Rule 16 amendment until a special session of the committee could be convened on or before September 30, 2006.

Mr. Fiske was unable to attend the remainder of the meeting.

C. Rule 29. Proposed Amendment Regarding Motion for a Judgment of Acquittal

Professor Beale reported that the Rule 29 Subcommittee had addressed the concerns raised at the previous committee meeting. The changes clarified the defendant's waiver of double jeopardy rights, permitted courts either to deny or defer a mid-trial motion for a judgment of acquittal, and made the rule more user-friendly overall. Judge Bucklew noted that a majority of the committee had expressed support for the proposed amendment in a straw vote taken in a previous meeting.

Judge Friedman reported significant concern among judges with whom he had discussed the provision on the waiver of double jeopardy rights. Judge Tallman said that he welcomed the proposed amendment, which, in his view, would have positively altered the outcome of a recent Ninth Circuit *en banc* decision. Judge Jones said he opposed the proposal because erroneous preverdict judgments of acquittal were not a major problem, and the change would undermine the public policy underlying the double jeopardy clause. He predicted that it would also inadvertently create other problems, such as potentially depriving the district court of jurisdiction in an ongoing trial if the government appealed a waiver-accompanied judgment of acquittal involving fewer than all counts or fewer than all co-defendants.

Mr. Campbell said that the Department had conducted an internal survey among U.S. attorney's offices nationwide to determine whether erroneous preverdict judgments of acquittal represented a major problem. The results, he said, showed that the problem is "more widespread than we thought," occurring in a significant number of cases. Mr. Campbell stressed the voluntary nature of the waiver of double jeopardy rights and predicted that Judge Jones's concerns about loss of jurisdiction during a partial appeal would not prove problematic in practice.

At Judge Trager's suggestion, the committee decided first to vote on the revised wording of the proposed amendment, then to vote as a policy matter whether to endorse the proposal for publication. Judge Trager moved to accept the current wording of the proposed amendment.

The committee without objection approved the wording of the Rule 29 amendment.

Judge Tallman moved to approve the amendment for publication. Judge Wolf expressed concern that the proposal took power away from judges. Judge Jones noted that many judges would oppose the proposal. Mr. Wroblewski said that the proposed amendment would simply transfer power from a single trial-level judge to a panel of three appellate judges.

The committee voted 6-5 to send the proposed Rule 29 amendment to the Standing Committee with a recommendation that it be published for public comment.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Time Computation Subcommittee

Judge Kravitz briefed the committee on the time computation template, which abolishes the "10-day rule" and adopts the "days are days" principle. If the Standing Committee at its June meeting approves the Time Computation Subcommittee's proposal, he said, each Advisory Rules Committee will be asked to review their deadlines and consider how best to translate those time units into the new time computation framework. Judge Kravitz recommended that a subcommittee be appointed to begin work immediately following the Standing Committee's June meeting.

Judge Kravitz noted that the subcommittee had resolved the question of how to calculate an hour-based deadline that falls on a weekend or holiday by extending the deadline to the *same* hour — not the *first* hour — of the following business day. There were two issues that the subcommittee discussed but left unresolved. First, the group debated whether a definition of court inaccessibility was needed, given that physical access to the courthouse did not always coincide with electronic access to a court's computer servers. The second unresolved issue was whether to eliminate the three-day rule for any means of service other than postal mail. Judge Bucklew and Professor King recommended allowing districts to interpret court inaccessibility differently. Judge Jones said he would oppose abolishing the three-day rule for electronic filing, given an increase he has noticed in Saturday morning e-filings, which opposing counsel often does not learn about until Monday morning. Judge Kravitz noted that the subcommittee's overriding concern was to try to prevent such gamesmanship. Also, the subcommittee recommended that each committee consider using multiples of seven in calculating specific deadlines, but had decided against including this as a template requirement. Following discussion, Justice Edmunds moved to approve the time computation template for eventual publication with each committee's specific deadline changes.

The committee without objection approved the template for eventual publication.

B. Rule 12. Challenges to Facial Validity of Indictment, Department of Justice Proposal

The committee discussed the Department's proposed amendment to Rule 12(b)(3)(B), which would prohibit defendants from challenging the facial validity of an indictment or information during or following trial. Mr. Campbell said that the proposed amendment would not affect challenges to the court's jurisdiction, but would simply require defendants to file motions alleging a failure to state an offense in a more timely fashion, at the pre-trial stage.

Judge Wolf asked what a court should do if, mid-trial, an element of the offense is found to be missing from the indictment. Judge Jones asked whether constitutional issues would be raised if a defendant were convicted of being a felon in possession of a firearm, despite the fact that the interstate commerce nexus, though evidenced at trial, was never properly alleged. Judge Tallman

said that, absent a due process notice problem, the case law indicated that the court had the inherent authority to continue the trial and allow a superseding indictment to be filed. The proposed amendment would simply set a procedural deadline for raising a facial attack, he said, and would not mean that failure to do so constitutes a waiver of constitutional objections. Mr. Goldberg said that the proposal was consistent with *United States v. Cotton*, 535 U.S. 625 (2002). Responding to a question by Mr. McNamara, Mr. Campbell said that he suspected that the situation addressed by the proposed amendment was actually "not that common." Judge Wolf moved to table the proposal until the October 2006 meeting. Judge Trager suggested that the committee needed a more detailed memorandum analyzing the Department's proposal before taking any action.

The committee voted 9-2 to table the proposed amendment until the October 2006 meeting.

C. Rule 41. Warrants for Digital Evidence

There was a discussion of the proposal to amend Rule 41 to address concerns raised by George Washington University Law Professor Orin S. Kerr in his article, *Search Warrants in an Era of Digital Evidence*, 75 MISS. L. J. 85 (2005). Judge Battaglia explained that search warrants for computerized data are regularly causing problems for magistrate judges across the country. Computers are initially seized and transported to labs, and only later are the data stored on the computers searched. Rather than simply adopting Professor Kerr's suggested rule amendments, Judge Battaglia recommended appointing a subcommittee to study the issue and to draft a rule amendment proposal. Mr. Wroblewski suggested that the committee wait until the Supreme Court had clarified how particular a search warrant for computerized data needs to be. Judge Bucklew appointed a subcommittee to examine this issue, to be chaired by Judge Battaglia.

The committee without objection decided to have a subcommittee study this issue further.

D. Rule 41. Authorizing Magistrate Judge to Issue Warrants for Property Outside of United States, Department of Justice Proposal

The committee discussed the Department's proposal to amend Rule 41(b) to authorize magistrate judges to issue warrants for property that lies within the jurisdiction of the United States but outside that of any state or federal judicial district. Mr. Campbell said that the proposed amendment would address, for instance, the Department's current inability to execute a search warrant in American Samoa, because the U.S. territory is not within the jurisdiction of any district court. Judge Jones asked why the proposed rule did not cover United States military bases or other areas abroad controlled by the United States. Mr. Campbell said that the proposal had undergone extensive review by such agencies as the Department of State and the Office of Management and Budget and that its scope was deliberately kept narrow to avoid any thorny international issues. Judge Trager moved to send the proposal to the Standing Committee with a recommendation that it be published for public comment.

Judge Battaglia said that, although he supported solving the problem illustrated by the American Samoa situation, he thought that any jurisdictional change would require Congressional action. He also raised concern about the proposal's creation of a hierarchy among magistrate judges by conferring jurisdiction for foreign warrants on the three magistrate judges in the District of the District of Columbia. Mr. Wroblewski said that the Department had considered seeking legislation, but thought that only forum, not jurisdiction, was at issue, and that it might be more respectful to come to the rules committees first. He and Mr. Campbell noted that Congress has already invested the District of Columbia court with default jurisdiction over several categories of extraterritorial and international matters. Judge Battaglia suggested designating the District of Columbia as the default forum when no other court had jurisdiction rather than as an alternative forum in every instance. Mr. Campbell said that the Department would not oppose that change. Judge Trager, however, recommended publishing the proposed amendment as drafted by the Department.

The committee voted 10-1 to approve the Rule 41(b) amendment as drafted and send it to the Standing Committee with a recommendation that it be published for public comment.

Professor Beale advised that she would draft a committee note and circulate it for committee approval before sending the note to the Standing Committee.

E.Amending the Collateral Relief Procedures, Department of Justice Proposal

The committee discussed the Department's proposal to invalidate the writs of *coram nobis, coram vobis, audita querela,* bills of review, and bills in the nature of review by adding a new Rule 37 and amending the Rules Governing Section 2254 and Section 2255 Proceedings. Mr. Wroblewski said that the proposal was designed to provide "one-stop shopping" for these collateral relief procedures as part of a decade-long effort by Congress and the federal rules committees to regularize federal habeas practice. He cited *Gonzalez v. Crosby*, 545 U.S. __, 125 S. Ct. 2641 (2005), where the Supreme Court held that petitioners could challenge irregularities in a habeas proceeding with a Rule 60(b) motion, but not the substance of a previous court habeas decision on the merits. The Department's proposal would authorize motions for reconsideration in actions brought under 28 U.S.C. §§ 2254 and 2255, Mr. Wroblewski said, but would restrict Rule 60 motions in accordance with *Gonzalez* and would also require certificates of appealability. Following discussion, Judge Jones moved to table the proposal for preliminary consideration by a subcommittee. Judge Bucklew indicated that she would appoint a subcommittee.

The committee without objection decided to table the proposal until the next meeting.

F. Rules 7 and 32.2, Department of Justice Proposal

As an informational matter, Judge Bucklew reported that the Department's proposal to amend Rules 7 and 32.2 with respect to criminal forfeiture had been referred to a subcommittee chaired by Judge Wolf. The subcommittee had met twice and determined that additional work was necessary before it could make a recommendation. Judge Friedman, who recently issued an opinion

denying the government a monetary judgment in a criminal forfeiture case, expressed concern about affording the government an independent source of authority for monetary judgments.

VI. REPORT ON STATUS OF RELEVANT LEGISLATION

There was a brief discussion of legislation enacted after Hurricane Katrina authorizing courts to sit outside their jurisdiction under certain circumstances as well as of the Department's legislative proposal to reinstate a mandatory sentencing scheme, through "topless guidelines," in the wake of the Supreme Court's decisions in *Booker*, *supra*, and *Blakely v. Washington*, 542 U.S. 296 (2004).

VII. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Before adjourning the meeting, Judge Bucklew reminded the members that the committee's next meeting is scheduled for October 26-27, 2006, in Amelia Island, Florida.

Respectfully submitted,

Timothy K. Dole
Attorney Advisor
Administrative Office of the United States Courts

8-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 15, 2006**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 24th and 25th at Fordham Law School in New York City. The Committee approved one proposed amendment to the Evidence Rules — ultimately for direct enactment by Congress — with the recommendation that the Standing Committee approve it for release for public comment. The proposal is discussed as an action item in this Report.

The Evidence Rules Committee also discussed proposals for amending the hearsay rule and its exceptions, as well as a new rule that would cover information presented in electronic form. After extensive discussion, the Committee decided not to proceed with either of these proposals at this time. But the Committee did decide to consider the possibility of proceeding with a project to restylize the Evidence Rules. The Committee's decisions in all of those respects are discussed as information items in this Report.

The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report. Also attached is the proposed amendment recommended for release for public comment.

II. Action Item

Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product.

The Evidence Rules Committee has found a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. One major problem is that significant amounts of time and effort are expended during litigation to preserve the privilege, even when many of the documents are of no concern to the producing party. Parties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. The Committee has determined that the discovery process would be more efficient and less costly if documents could be produced without risking a subject matter waiver of the attorney-client privilege or work product protection.

Another concern expressed to the Committee by members of the bar involves the production of confidential or work product material by a corporation that is the subject of a government investigation. Most federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This is a problem because it can deter corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

The Committee directed its Reporter and its consultant on privileges to prepare a draft rule for its consideration that would address the problems of subject matter waiver, inadvertent disclosure, enforceability of confidentiality orders, and selective waiver. This draft rule was distributed in advance of the Committee meeting to selected federal judges, state and federal regulators, members of the bar, and academics. On the first day of its April meeting, the Committee held a mini-hearing on the proposed rule 502 and Committee Note, inviting presentations from those who reviewed the rule. (A transcript of the hearing is available from John Rabiej).

Based on comments received at the hearing, the Reporter and consultant revised the draft for consideration by the Committee at its meeting. Most importantly, the draft was scaled back so that it no longer regulates state rules on waiver as applied by state courts. The Committee— together with its liaisons and several members of the Civil Rules Committee invited to attend the meeting — discussed the draft proposal in extensive detail.

The Committee unanimously agreed on the following basic principles, as embodied in the proposed Rule 502:

1. A subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure "ought in fairness" to be required in order to protect against a misrepresentation that might arise from the previous disclosure.

2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.

3. A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.

4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court; and in order to give the parties reliable protection, that confidentiality order must bind non-parties in any federal or state court.

5. Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements; but in the absence of a court order, these agreements cannot bind non-parties.

After substantial discussion, the Evidence Rules Committee unanimously approved the proposed Rule 502 and the accompanying Committee Note for release for public comment. The proposed Rule 502 and Committee Note are attached to this Report as Appendix A.

Recommendation: The Evidence Rules Committee recommends that the proposed Evidence Rule 502 be approved for release for public comment.

III. Information Items

A. *Crawford v. Washington and the Federal Rules Hearsay Exceptions*

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against the accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. Questions exist about 1) the scope of the term "testimonial" and 2) whether the Confrontation Clause imposes limitations on hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has decided that because of the uncertainty created by *Crawford*, and the recency of the Supreme Court decisions in the 2005-6 term that interpret *Crawford*, it would be imprudent to propose amendments to specific hearsay exceptions that might be construed to admit testimonial hearsay. Any attempt to determine the correct scope of the term "testimonial" might be undermined by subsequent case law handed down during the time that the rule would be going through the rulemaking process.

At its April meeting the Committee considered whether to propose a generic reference to constitutional limitations on hearsay in light of *Crawford*. A general reference to the constitutional rights of an accused could be placed in the hearsay rule itself (Rule 802) as well as the hearsay exceptions (Rules 801(d), 803, 804 and 807). But the Committee resolved not to proceed with any amendment that would provide a reference to constitutional limitations in the hearsay exceptions or the hearsay rule. The Committee determined that "constitutional warning" language was not necessary because most counsel are now aware of *Crawford*; an amendment would make the already-long Rules 801, 803 and 804 even longer; and any amendment adding constitutional language would raise the anomaly that other rules, such as perhaps Rule 403 and 404, might be subject to unconstitutional application and yet would not have similar constitutional-warning language.

B. Electronic Evidence, and Possible Restylizing of the Evidence Rules

At its Fall 2005 meeting the Evidence Rules Committee tentatively approved a new Rule 107, an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposed Rule 107 would have updated the "paper-based" language in the Evidence Rules as follows:

Rule 107. Electronic Form

> As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed", "publication," "published", "record," "recorded", "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

Upon reconsideration at its April 2006 meeting, the Committee determined that it would not proceed with the proposed amendment at this time. The Committee noted that courts are not having any trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence and that any amendment may lead to the unintended consequence of a substantive change in one or more of the Evidence Rules. The Committee also determined that the Rule would not really serve a notice function, because counsel would not think to look at a freestanding Rule 107 to determine

what "writing" means in, e.g., Rule 902. It was observed that the only way to update the language of the Evidence Rules effectively would be to amend each paper-based rule directly.

The Committee's resolution on an electronic evidence rule led to a discussion of whether the Committee might wish to propose a restylization project for the Evidence Rules. The Committee determined that such a project would be worthy of consideration, so long as it was understood that the project would not result in a major restructuring of the Rules, such as a change of rule numbers.

The Committee directed the Reporter to pick a few rules that are clearly in need of restyling, and to work with Professor Kimble to prepare a restyled version of those rules for the Committee's consideration at the next meeting.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

IV. Minutes of the April 2006 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April 2006 meeting is attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Evidence Rule 502 and Committee Note
Draft Minutes

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

1 **(a) Scope of waiver.** — In federal proceedings, the
2 waiver by disclosure of an attorney-client privilege or work
3 product protection extends to an undisclosed communication
4 or information concerning the same subject matter only if that
5 undisclosed communication or information ought in fairness
6 to be considered with the disclosed communication or
7 information.

8 **(b) Inadvertent disclosure.** — A disclosure of a
9 communication or information covered by the attorney-client
10 privilege or work product protection does not operate as a
11 waiver in a state or federal proceeding if the disclosure is
12 inadvertent and is made in connection with federal litigation
13 or federal administrative proceedings — and if the holder of
14 the privilege or work product protection took reasonable

*New material is underlined; matter to be omitted is lined through.

15 precautions to prevent disclosure and took reasonably prompt
16 measures, once the holder knew or should have known of the
17 disclosure, to rectify the error, including (if applicable)
18 following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

19 [(c) **Selective waiver.** — In a federal or state
20 proceeding, a disclosure of a communication or information
21 covered by the attorney-client privilege or work product
22 protection — when made to a federal public office or agency
23 in the exercise of its regulatory, investigative, or enforcement
24 authority — does not operate as a waiver of the privilege or
25 protection in favor of non-governmental persons or entities.
26 The effect of disclosure to a state or local government agency,
27 with respect to non-governmental persons or entities, is
28 governed by applicable state law. Nothing in this rule limits
29 or expands the authority of a government agency to disclose
30 communications or information to other government agencies
31 or as otherwise authorized or required by law.]

32 **(d) Controlling effect of court orders.** — A federal
33 court order that the attorney-client privilege or work product
34 protection is not waived as a result of disclosure in connection
35 with the litigation pending before the court governs all
36 persons or entities in all state or federal proceedings, whether
37 or not they were parties to the matter before the court, if the
38 order incorporates the agreement of the parties before the
39 court.

40 **(e) Controlling effect of party agreements.** — An
41 agreement on the effect of disclosure of a communication or
42 information covered by the attorney-client privilege or work
43 product protection is binding on the parties to the agreement,
44 but not on other parties unless the agreement is incorporated
45 into a court order.

46 **(f) Included privilege and protection.** — As used in
47 this rule:

48 1) "attorney-client privilege" means the protection
49 provided for confidential attorney-client communications,
50 under applicable law; and
51 2) "work product protection" means the protection
52 for materials prepared in anticipation of litigation or for trial,
53 under applicable law.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine — specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product

material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. For example, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. *See* 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. *Cf.* Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" —

is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise

between two competing premises. On the one hand, information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

Subdivision (c). Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties.

See, e.g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and

efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production

review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Subdivision (f). The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

8-B

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 24-25, 2006

New York, New York

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 24-25, 2006 at Fordham Law School in New York City.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
Thomas W. Hillier II
Patricia L. Refo, Esq.
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee
Professor Edward H. Cooper, Reporter to the Civil Rules Committee
Chilton D. Varner, Esq., Member of the Civil Rules Committee
Daniel Girard, Esq., Member of the Civil Rules Committee
Professor Richard L. Marcus, Consultant to the Civil Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Brooke Coleman, Esq., Rules Clerk for Judge Levi
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq. Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

Opening Business

Judge Smith welcomed the members of the Civil Rules Committee who were attending the meeting in order to provide comment on the proposed rule on waiver of privilege and work product that is being prepared by the Evidence Rules Committee. Judge Smith reported on the actions taken on the proposed amendments to Rules 404, 408, 606(b) and 609, which have been approved by the Supreme Court and are before Congress.

Judge Smith asked for approval of the minutes of the November 2005 Committee meeting. The minutes were approved.

Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made less expensive. Other concerns include the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This is a problem because it can deter corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

At the November 2005 Committee meeting, Professor Broun had presented for the Committee's consideration a draft rule covering 1) inadvertent disclosures; 2) disclosure to

government agencies; 3) subject matter waiver; 4) the protective effect of a confidentiality order; and 5) the effect of a confidentiality agreement among the parties. The Committee extensively discussed the draft and provided comments and suggestions at that meeting, and Professor Broun and the Reporter revised the draft rule and added a proposed Committee Note for the consideration of the Committee at the April 2006 meeting. The draft proposed Rule 502 provided for the following:

1. A voluntary disclosure of privilege or work product would operate as a waiver unless an exception could be found in the Rule. But a waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

2. Inadvertent disclosures during discovery in either state or federal court would not constitute a waiver so long as the producing party acted reasonably in trying to maintain the privilege and promptly sought return of the privileged material.

3. Disclosure of privileged information to a federal or state government agency during an investigation would not constitute a waiver to private parties in either state or federal litigation.

4. A federal or state court could enter an order protecting against the consequences of waiver in a case, and such an order would be binding on third parties in state or federal court.

5. Parties could enter into agreements protecting against the consequences of waiver in a case, but those agreements would not bind third parties unless they were incorporated into a court order.

The morning of the April 2006 meeting was devoted to a mini-hearing on the proposed rule 502 and Committee Note. The Committee invited the views of a federal judge, a federal magistrate judge, a number of practitioners and two academics. Much of the discussion and controversy was about the merits of the "selective waiver" rule, i.e., the provision that disclosure to a government agency would not constitute a waiver to private parties. Concern was also expressed about the breadth of the proposed rule, insofar as it would alter state law on waiver of privilege and would even provide that a waiver ruling in one state would bind non-parties in a court of a different state.

After the presentations and discussion, Professor Broun and the Reporter revised the proposal for consideration by the Committee in its afternoon session. The basic changes were:

1. The rule would not regulate state-to-state waiver issues, nor would it bind a federal court to a confidentiality order issued by a state court. It would, however, bind state courts to the federal waiver rule with respect to inadvertent disclosure, selective waiver, and federal court confidentiality orders.

2. The rule would not state that a voluntary disclosure constitutes a waiver unless an exception could be found. Rather, the rule would take the law of voluntary disclosure as it found it, and would provide exceptions and limitations whenever a court would otherwise find a waiver.

3. The inadvertent disclosure provision would not be limited to disclosures in discovery, but rather would cover any mistaken disclosure of privilege or work product.

The Committee and its many guests then discussed the text of the proposal at the afternoon session. A number of considerations were raised and discussed concerning, among other things:

1) the breadth of the rule;
2) whether a rule adopting selective waiver made sense in light of the fact that most federal courts had rejected the concept;
3) whether the selective waiver language, which would apply to disclosures "during an investigation" might be overbroad or too vague;
4) whether the rule should include a proviso that it was not intended to regulate the government's disclosure of information to other government agencies or as required by law;
5) whether the rule should cover the effect of a disclosure of information to a state regulator;
6) whether the rule should even cover the question of selective waiver;
7) whether the rule should provide that inadvertent disclosure should always, or never, constitute a waiver;
8) whether the rule should cover unauthorized disclosures; and
9) whether the language providing for confidentiality orders should be narrowed to provide that such an order could only cover confidentiality of material disclosed in connection with litigation pending before the court.

Based on this discussion, the Committee determined that the draft rule before it should be revised as follows:

1. The selective waiver provision would be bracketed, to indicate that the Committee had not determined to approve the provision, but was seeking public comment on its merits.

2. The language in the selective waiver provision concerning disclosures "during an investigation" needed to be narrowed or better defined.

3. The selective waiver provision should specify that it was not intended to cover disclosures to state regulators, nor to affect the government agency's disclosure to other agencies or as required by law.

4. Confidentiality orders should be enforceable only insofar as they covered disclosure of material in the case before the court.

After extensive discussion, the Committee voted unanimously to recommend that a proposed Rule 502 and Committee Note, as revised during its discussion, be released for public comment. The Reporter and Professor Broun then redrafted the proposed Rule and Committee Note for review by the Committee and its guests the next morning. This redraft addressed all the changes approved by the Committee; and specifically, with respect to the selective waiver language covering disclosures "during an investigation," the drafters borrowed language from the recently amended Rule 408 — language that was previously offered by the Justice Department to cover statements made to government regulators. That language covers disclosures "when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

At the Tuesday morning session, the Committee and its guests reviewed the revised Rule 502 and Committee Note. After a short discussion— including some suggestions on style, which were implemented — the Committee voted unanimously to recommend that the proposed Rule 502 and Committee Note (as set forth below) be released for public comment.

The Rule and Committee Note, as unanimously approved by the Committee for release for public comment, provides as follows:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

[(c) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a

government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and

2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also* Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure, September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244

(D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. For example, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. *Cf.* Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.,* 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials

actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g.*, Manual for Complex Litigation Fourth § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

Subdivision (c): Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client

constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See* Manual for Complex Litigation Fourth § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a

case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Subdivision (f). The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made solely for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. In contrast, courts are in dispute about whether 911 calls and statements made to responding officers are testimonial. The Committee is monitoring developments and is awaiting the Supreme Court's decisions in two state cases involving *Crawford's* effect on the admissibility of 911 calls and statements made to responding officers.

The Evidence Rules Committee decided that because of the uncertainty created by *Crawford*, and the pending Supreme Court decisions on the subject, it would be imprudent to propose amendments to specific hearsay exceptions that might be construed to admit testimonial hearsay. Any attempt to determine the correct scope of the term "testimonial" might be undermined by subsequent case law handed down during the time that the rule would be going through the rulemaking process.

At the Fall 2005 meeting, some Committee members suggested that a generic reference to constitutional requirements might usefully be placed either in the hearsay rule itself (Rule 802) or before each of the rules providing exceptions that might be problematic after *Crawford* (Rules 801(d)(2), 803, 804 and 807). Such a generic reference does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. The Committee directed the Reporter to prepare a draft amendment that would provide a basic reference to the constitutional rights of the accused with regard to admission of hearsay under the Federal Rules hearsay exceptions.

At the April 2006 meeting, the Committee considered the draft prepared by the Reporter and resolved not to proceed with any amendment that would provide a reference to constitutional limitations in the hearsay exceptions or the hearsay rule. Committee members stated that such

language was not necessary because most counsel are now aware of *Crawford*; an amendment would make the already-long Rules 801, 803 and 804 even longer; and any amendment adding constitutional language would raise the anomaly that other rules, such as perhaps Rule 403 and 404, might be subject to unconstitutional application and yet would not have similar constitutional-warning language. One member dissented from the Committee's determination, on the ground that constitutional-warning language in the hearsay exceptions might provide important notice to counsel who are inexperienced in criminal defense.

Electronic Evidence, and Restylizing the Evidence Rules

At its Fall 2005 meeting the Committee tentatively approved a new Rule 107, an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposed Rule 107 would update the "paper-based" language in the Evidence Rules as follows:

> **Rule 107. Electronic Form**
>
> As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed", "publication," "published", "record," "recorded", "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

Upon reconsideration at the April 2006 meeting, the Committee determined unanimously that it would not proceed with the proposed amendment at this time. The Committee noted that courts are not having any trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. One member observed that paper-based language might actually be appropriate in some Rules, such as Rule 612, which requires a "writing" to be produced when it refreshes recollection; if "writing" covers electronic information as well, then the Rule might be read to require production of a telephone call that refreshed a witness's recollection.

Judge Thrash, the liaison from the Standing Committee, observed that the Rule would not really serve a notice function, because counsel would not think to look at a freestanding Rule 107 to determine what "writing" means in, e.g., Rule 902. He concluded that the only way to update the language of the Evidence Rules was to amend each paper-based rule directly.

Judge Thrash's comment led to a discussion of whether the Committee might wish to propose a restylization project for the Evidence Rules. The Committee determined that such a project would

be worthy of consideration, so long as it was understood that the project would not result in a major restructuring of the Rules, such as a change of rule numbers.

The Committee directed the Reporter to pick a few rules that are clearly in need of restyling, and to work with Professor Kimble to prepare a restyled version of those rules for the Committee's consideration at the next meeting.

Other Business

Judge Smith noted with regret that the terms of two valued Committee members were expiring. He expressed the Committee's thanks to Trish Refo and Tom Hillier for their stellar contributions to the work of the Committee.

The meeting was adjourned on Tuesday April 25, with the time and place of the Fall 2006 meeting to be announced.

9

MEMORANDUM

DATE: January 20, 2006

TO: Advisory Committees

FROM: Judge Mark R. Kravitz, Chair
Time-Computation Subcommittee

RE: Time-Computation Template

Last year, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge David Levi asked me to chair the Subcommittee, and he asked Prof. Patrick Schiltz, the reporter to the Appellate Rules Committee, to serve as the Subcommittee's reporter. The Subcommittee's main task is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within eight days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than seven days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A)

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[1]*See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. The Subcommittee has spent the past four months working toward that goal. In early September, I circulated to the advisory committee chairs and reporters and then to the Subcommittee members a report drafted by Prof. Schiltz that listed all of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit attention. A copy of Prof. Schiltz's report is attached.

On October 4, the Subcommittee met via conference call, reviewed all of the issues identified by Prof. Schiltz, and made tentative decisions about what should be included in the template. In November, Prof. Schiltz circulated a draft template that attempted to implement the Subcommittee's decisions. On December 14, the Subcommittee met again via conference call (the advisory committee reporters joined us), reviewed the draft template, and decided on a number of changes. Prof. Schiltz then drafted a revised template that incorporated all of those changes. That template was favorably reviewed by the Standing Committee at its meeting earlier this month.

The template is attached. At this point, we are asking that the advisory committees review the template and share any concerns or suggestions that they have. That input can be communicated through the advisory committee reporters or directly to Prof. Schiltz (pjschiltz@stthomas.edu) or me (Mark_Kravitz@ctd.uscourts.gov). Following the spring advisory committee meetings, the Subcommittee will review any comments that we receive and prepare a final template. We hope to present that final template to the Standing Committee at its June 2006 meeting.

Assuming that the template is approved by the Standing Committee, the advisory committees will then have to draft amendments to their respective time-computation rules. The advisory committees will also have to review their deadlines and decide whether to propose changes to those deadlines in light of the new time-computation rules. Our hope is to publish both the proposed changes to the time-computation rules and the proposed changes to the deadlines in August 2007, so that the bench and bar can consider them as a package. The tentative schedule for the time-computation project is thus as follows:

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[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Late Spring 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves final template
June 2006	Standing Committee approves final template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect final template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

I wish to draw your attention to two additional issues. Both of these issues are identified in Prof. Schiltz's report, and both were discussed by the Subcommittee. For reasons that I will describe, though, the Subcommittee ultimately decided — and the Standing Committee agreed — that the issues should be addressed by other committees. At its January meeting, the Standing Committee indicated that it would appreciate guidance from the advisory committees on both of these issues.

1. *Accessibility of Clerk's Office.* Under both the template and the existing rules, "a day on which weather or other conditions make the clerk's office inaccessible" is treated like a Saturday, Sunday, or legal holiday for time-computation purposes. The question is whether the concept of "inaccessibility" should be rethought in light of the emergence of electronic service and filing. Should a clerk's office be deemed "inaccessible" if inclement weather closes the office, but the clerk's servers continue to operate, and thus electronic filing is possible? Alternatively, should a clerk's office be deemed "inaccessible" if the weather is fine but the clerk's servers go down and thus electronic filing is not possible? What if the servers go down for only an hour? Four hours? Eight hours?

This is a thorny problem raising important policy issues that will need to be discussed at length. This is also a problem that will benefit from the expertise of the members of the Subcommittee on Technology — the same Subcommittee that has in the past proposed rules governing electronic service and filing. For those reasons, this problem has been referred to that Subcommittee. It is likely, though, that this issue will eventually end up before the advisory committees, and, as I noted, the Standing Committee and the Subcommittee on Technology are now looking for guidance from the advisory committees on how to proceed.

2. *The "Three-Day Rule."* The "three-day rule" is found in Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c). It provides that, when a party is required to act within a prescribed period after a paper is served on that party, and the paper is served by any means except personal service, three days are added to the prescribed period.

Some have suggested that the three-day rule should be abolished. It complicates time computation by forcing parties to figure out whether they get three extra days to respond to a paper. In the past, parties have had difficulty grasping the fact that the three-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order. This difficulty, in turn, has caused parties to miss deadlines.

Another problem with the current version of the three-day rule is that it creates an incentive for parties to use mail service and to avoid other means of service. For example, when a party serves an opponent electronically, the opponent gets three extra days, even though, in the vast majority of cases, the opponent will receive the paper instantaneously. If the deadline is 10 days, the opponent will, as a practical matter, have 13 days to work on its response. If the party instead serves the opponent by U.S. mail, the paper will not be delivered for at least two or three days, giving the opponent only 10 or 11 days to work on its response.

The Subcommittee discussed the three-day rule and decided that it should not be abolished. The Subcommittee feared that, if it was abolished, parties would avoid personal service, electronic service, and service by commercial carrier, and opt instead for U.S. mail. The Subcommittee thought that it might make sense to apply the three-day rule only to service by U.S. mail, but the rules of practice and procedure were just amended in 2002 to extend the three-day rule to electronic service, reflecting a decision that the Standing Committee made on the recommendation of the Subcommittee on Technology. Our Subcommittee did not feel comfortable revisiting such a recent decision of the Standing Committee. However, at its January meeting, the Standing Committee indicated that it would like guidance from the advisory committees regarding whether its decision should be revisited.

Our Subcommittee was also reluctant to address the question of whether to modify the three-day rule because the question implicates several other issues. In many courts, electronic service and filing is now mandatory for most parties. Those parties will file and serve

electronically no matter what the three-day rule provides. The fact that mandatory electronic filing and service is likely to become pervasive within the next decade may have implications for whether the three-day rule should maintained. In addition, the three-day rule is necessary only because, under the rules of practice and procedure, service by U.S. mail is effective on mailing, service by commercial carrier is effective on delivery to the carrier, and service by electronic means is effective on transmission. If service were effective on some other event — such as *receipt* — then the justification for the three-day rule would disappear. The problems with the three-day rule may justify a reexamination of the rules regarding the effectiveness of service.

The Subcommittee determined, and the Standing Committee agreed, that this issue is best addressed, at least as an initial matter, by the advisory committees. If there is strong sentiment for change among the advisory committees, then either the Subcommittee on Technology or another subcommittee will likely be asked to coordinate work on this issue, as it is obviously important to maintain consistency among the rules of practice and procedure.

Thank you for your assistance with these matters.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . .

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . .

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order . . . .

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the Subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only "restyling" to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . When the period of time prescribed or allowed is

less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of "calendar days." (More about calendar days below.)

The "11-day rule" (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.[3] The Subcommittee should consider eliminating the 11-day rule and providing instead that "days are days" — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A "days are days" rule would also moot the

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[3] If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005). Ed Cooper points out that a 10-day deadline can actually extend to 17 days, if it begins running on a Friday, December 22.

inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of "calendar days." Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then "days are days," and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that "[t]he court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."

In addition, Appellate Rule 26(c) — the "3-day rule" (discussed below) — is stated in calendar days: "When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in "days.")

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days." And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal "by third-party commercial carrier for delivery within 3 calendar days."

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if "days were days" — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the Subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . .

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday . . . . When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, [or] legal holiday . . . .

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only "restyling" to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK'S OFFICE INACCESSIBLE

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk's office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute . . . . The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(3) ***Last Day.*** Include the last day of the period unless it is a . . . day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the Subcommittee may wish to address it.

The Subcommittee may also wish to consider whether to address the myriad problems that will arise as electronic filing becomes pervasive. For example, suppose that the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system? Or because of problems with the filing attorney's or party's computer system? Or suppose the opposite: The clerk's office is physically closed, but electronic filing is possible 24 hours per day, 365 days per year. Should the rules provide that a paper that is filed electronically at 11:59 p.m. on the last day of a deadline is timely, even though it was filed after clerk's office had closed?

My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility. It may be that attempting to address these issues now would be premature, and that we should instead give courts and local rulemakers a few years to identify the issues that electronic filing will present and experiment with various means of addressing those issues.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

B. Bankruptcy Rule

Rule 9006. Time

(a) Computation. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

(a) COMPUTATION. . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

* * * * *

(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(I) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

(ix) Thanksgiving Day;

(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

* * * * *

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

* * * * *

(f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. Time

* * * * *

(e) ADDITIONAL TIME AFTER SERVICE UNDER RULE 5(b)(2)(B), (C), OR (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

D. Criminal Rule

Rule 45. Computing and Extending Time

* * * * *

(c) **Additional Time After Service.** When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules[4] and the Criminal Rules[5]). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The Subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, "days are days." The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the Subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives already exist under the present rule. For example, a party might opt for mail rather than electronic service because,

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[4] *See* FED. R. BANKR. P. 7005.

[5] *See* FED. R. CRIM. P. 49(b).

although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed." 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals "take up and decide" the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The Subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. "Backward-looking" deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing." If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The Subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would reduce the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem altogether (parties can be served on — and thus deadlines can run from — a Saturday or Sunday), nor reduce the problem of deadlines ending on legal holidays.

1 **Rule 6. Computing and Extending Time**

2 **(a)** **Computing Time.** The following rules apply in computing any time period specified in
3 these rules or in any local rule, court order, or statute.

4 **(1)** ***Period Stated in Days.*** When the period is stated in days,

5 **(A)** exclude the day of the act, event, or default that triggers the period;

6 **(B)** count every day, including intermediate Saturdays, Sundays, and legal
7 holidays; and

8 **(C)** include the last day of the period unless it is a Saturday, Sunday, legal
9 holiday, or — if the act to be done is filing a paper in court — a day on
10 which weather or other conditions make the clerk's office inaccessible.
11 When the last day is excluded, the period continues to run until the end of
12 the next day that is not a Saturday, Sunday, legal holiday, or day when the
13 clerk's office is inaccessible.

14 **(2)** ***Period Stated in Hours.*** When the period is stated in hours,

15 **(A)** begin counting immediately on the occurrence of the act, event, or default
16 that triggers the period;

17 **(B)** count every hour, including hours during intermediate Saturdays, Sundays,
18 and legal holidays; and

19 **(C)** if the period would end at a time on a Saturday, Sunday, legal holiday, or
20 — if the act to be done is filing a paper in court — a day on which weather
21 or other conditions make the clerk's office inaccessible, then continue the

period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. They do not apply when a fixed time to act is set. If, for example, a rule or order requires that a paper be filed "no later than November 1, 2007," then the paper is due on November 1, 2007. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to the rare time periods that are stated in weeks, months, or years. See, e.g., Fed. R. Evid. 901(b)(8).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 21, 2007, is due on Friday, August 31, 2007. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 22, 2007, is not due until Tuesday, September 4, 2007, because the tenth day (September 1) is a Saturday and Monday (September 3) is Labor Day.

The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a paper is due within 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is

filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

Subdivision (a)(3). New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

10

Judicial Conference Committee Chairs Long-Range Planning Meeting

March 13, 2006

Report

Administrative Office of the United States Courts
Office of Management, Planning and Assessment

SUMMARY REPORT
MARCH 2006 LONG-RANGE PLANNING MEETING

The March 13, 2006 long-range planning meeting was held in Washington, D.C. It was facilitated by Judge Charles R. Breyer, planning coordinator for the Judicial Conference's Executive Committee. The meeting was attended by the Executive Committee and chairs of 16 Judicial Conference committees. Administrative Office participants included Director Leonidas Ralph Mecham, Associate Director Clarence A. Lee, Jr., and Deputy Associate Director Cathy A. McCarthy, who provides principal staff support for the long-range planning process, and others. A list of participants is included as Appendix A.

Judge Breyer welcomed the group and reviewed the purpose of the meeting, which is to promote long-range planning by committees and provide a forum for information exchange and communication on strategic issues facing the judiciary. The meeting materials included a list of crosscutting and strategic issues identified by the committees in August 2003 (see Appendix B). Strategic issues are items or topics that are fundamentally important to the judiciary, and that must be monitored or closely acted upon because of their potential long-term impact on judicial administration. During their summer 2006 meetings, committees will be asked to identify current strategic issues.

Long-Range Budget and Cost-Containment Issues

Judge Julia Smith Gibbons, chair of the Budget Committee, and Judge Robert C. Broomfield, chair of the Budget Committee's Economy Subcommittee, discussed the long-range budget outlook and the status of the judiciary's cost-containment efforts. Judge Gibbons noted that the judiciary's situation has improved significantly due to the relative success of the judiciary in securing additional resources from Congress, combined with the implementation of early cost-containment initiatives.

Recently updated long-range budget estimates indicate a fiscal year 2009 shortfall of $295 million between projected requirements and available funding. The previously projected shortfall of $848 million for 2009 has declined significantly over the past two years due to higher appropriations projections based on recent success with Congress and lower requirements projections based on cost containment. Nevertheless, with a

projected shortfall of nearly $300 million,[1] the judiciary would not be able to fund any additional staff despite projected workload increases between now and 2009. The shortfall is currently projected to grow to $600 million by fiscal year 2016.

Judge Broomfield recognized the efforts of Director Ralph Mecham, noting that the judiciary's improved financial condition detailed by Judge Gibbons could not have happened without the Director's leadership. Judge Broomfield also noted that cost containment may be the salvation for the judiciary's long-term fiscal problems. He emphasized the potential savings that might be achieved from changing how some administrative services are delivered. The Economy Subcommittee recently discussed the project to reduce the number of computer servers supporting judiciary-wide automation systems with the chairs of the Committees on Information Technology (Chief Judge Thomas I. Vanaskie), Criminal Law (Judge Paul G. Cassell), and Judicial Resources (Judge W. Royal Furgeson, Jr.). He noted that the progress made on this effort is a clear example of how well the committees are working with each other. Judge Broomfield praised the committees for their willingness to look beyond their own particular interests at the greater interests of the judiciary, and remarked that cooperation among committees will be essential as we move forward.

Budget Caps

Judge Gibbons discussed the Budget Committee's interest in working with the various committees to control the growth in funding requests. After consultation with the Space and Facilities Committee, the Budget Committee had previously endorsed the concept of establishing a rent budget cap.[2] At its January 2006 meeting, the Budget Committee endorsed specific annual budget caps for fiscal years 2009 through 2016. The Budget Committee believes that the proposed caps, which fix annual percentage increases in rent to an average of 4.9 percent, will provide sufficient flexibility each year for inflation costs, and for some additional rent associated with future construction and minor alteration projects. The proposed caps allow an average increase of $4 million per year for rent resulting from minor construction projects, with an average increase of $6.5 million per year for rent resulting from major courthouse construction and repair and

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[1]This projection is based on current policies and formulae, specific items approved by the Judicial Conference and included in the fiscal year 2007 budget request, updated estimates of workload and case filings, and current estimates for pay and inflationary rate increases.

[2]Upon the recommendation of the Budget Committee, at its March 14, 2006 session, the Judicial Conference approved, in concept, the establishment of an annual budget cap for space rental costs to be determined by the Budget Committee in consultation with the Space and Facilities Committee.

alteration projects. The committee is now soliciting feedback on the recommended cap from the Space and Facilities Committee.

The Budget Committee also directed staff to assess whether it is feasible for budget caps to be applied to other areas of the judiciary's salaries and expenses budget, such as personnel and information technology, and to prepare a proposal for consideration at the July 2006 meeting of the Budget Committee with "spending" committee chairs. The AO budget staff will work with staff for the Committees on Defender Services and Judicial Security to propose budget caps for their respective appropriations for consideration at the January 2007 Budget Committee meeting.

Program-Based Planning and Budgeting

The concept and benefits of a program-based approach to planning and budgeting were discussed. This topic had been discussed previously at the long-range planning meetings in September 2003 and March 2004.[3] At those meetings, committee chairs agreed that the approach had merit and determined to begin construction of long-range budget estimates for each program (i.e., appellate, district, probation and pretrial, and bankruptcy).

This objective was deferred, however, in order to focus on the judiciary's cost-containment effort. After the March 2004 long-range planning meeting, then-Chief Justice Rehnquist charged the Executive Committee with the development of a comprehensive cost-containment strategy by September 2004. In order to meet this tight deadline, the assessment of options and the development of cost-containment initiatives by the committees required an intensive effort. Further development and implementation of cost-containment initiatives has continued to be a major activity over the past 18 months since the Judicial Conference's adoption of the strategy.

Cathy McCarthy described a program-based approach to planning, which would assess the comprehensive and unique requirements of the judiciary's major operating components. She differentiated programs – appellate courts, district courts, probation and pretrial services offices, bankruptcy courts, and defender services – from resource or spending categories, such as personnel, space and facilities, information technology, law books, or panel attorneys.

[3]Materials about program-based planing and budgeting from the September 2003 and March 2004 meetings were provided to committee chairs in advance, along with a set of discussion issues.

She described how a program-based orientation would compare to the judiciary's current method of planning and formulating budget requests. The current planning and budgeting process focuses on resource categories using a "current services plus" approach. Short- and long-range planning efforts rely largely on formulas and standard assumptions, and resource requirements are defined through separate processes for judgeships, staffing, space, and technology. Under the current approach, it can be difficult to consider the overall priorities for the courts and the impact of changes in one aspect of a program, such as technology developments, on other aspects of the program, such as staffing and space needs.

Program planning would enable a mission-based assessment of each program's issues and needs. Analysis of each program's condition would entail looking at the functions and activities of the program in terms of their proximity to the mission, and how effectively and efficiently they contribute to the performance of mission-critical functions. The analysis would consider whether any changes in policies, practices, technology, staffing or other areas would enhance court program operations. The committees would be able to use this information in identifying resource requirements for staffing, information technology, space, and other areas.

Judge W. Royal Furgeson, chair of the Committee on Judicial Resources, commented that a program-based approach could be helpful to his committee in carrying out its work. Staff will develop agenda items to help committees consider program issues at their summer meetings.

Compensation Study and Human Resources Transformation

Judge Furgeson briefly commented on the broad communication efforts associated with the compensation study, which is well underway. He noted that some believe addressing the rent issue will resolve the judiciary's budget concerns, although that is not the case. In fact, pay and benefits account for 64 percent of the spending from the salaries and expenses account, which funds the courts. The compensation study is designed to evaluate future compensation and get all the facts on the table. The study is not about cutting the salaries of our current employees. Members of the Committee on Judicial Resources will talk to as many people as they can in an effort to achieve the best balance possible.

Judge Furgeson described the Human Resources Transformation initiative of the Committee on Judicial Resources. The committee will use a strategic approach to examine how human resource services are and should be delivered across the judiciary. It

will consider who the customers are, their needs, and how those needs can be met effectively in the future. For example, in 2005, the judiciary hand-processed 588,746 personnel actions. The transformation initiative will assess how to improve business practices and make effective use of information technology tools.

Computer Desktop Transformation: Enterprise Portals

At the long-range planning meeting in March 2005, a panel of committee chairs discussed the strategic need for future technology efforts to look at how technology can help judges work more efficiently. At this meeting, Judge Thomas I. Vanaskie, chair of the Committee on Information Technology, and Assistant Director Melvin J. Bryson discussed one way information technology can help judges work more efficiently. They demonstrated a prototype web portal to show how portal technology can facilitate access from a home page portal site designed specifically to meet the needs of a particular judge. For example, the portal can offer access to systems and information such as case information, legal research and reference material, calendars, travel itineraries, and maps. The Information Technology Committee intends to pursue this initiative.

The next long-range planning meeting of committee chairs is scheduled for September 18, 2006. Suggestions for possible topics of interest for the next meeting should be sent to Judge Breyer or Cathy McCarthy.

Appendix A: Participants in the March 2006 Long-Range Planning Meeting

Committee Representatives	**Administrative Office Staff**
Planning Coordinator, Executive Committee Hon. Charles R. Breyer	Clarence A. Lee, Jr. Cathy A. McCarthy Brian Lynch Kim M. Whatley
Executive Committee Hon. Thomas F. Hogan, Chair Hon. Michael Boudin Hon. Joel M. Flaum Hon. Paul R. Michel Hon. David L. Russell Hon. John M. Walker, Jr. Leonidas Ralph Mecham, Director of the Administrative Office	Wendy Jennis Jeffrey A. Hennemuth Helen G. Bornstein
Committee on the Administrative Office Hon. Robert B. Kugler, Chair	Cathy A. McCarthy
Committee on the Administration of the Bankruptcy System Hon. Marjorie O. Rendell, Chair	Francis F. Szczebak Kevin Gallagher Mark J. Silver
Committee on the Budget Hon. Julia Smith Gibbons, Chair Hon. Robert C. Broomfield	George H. Schafer Marguerite R. Moccia James R. Baugher Michael V. (Mickey) Bork
Committee on Court Administration and Case Management Hon. John R. Tunheim, Chair	Noel J. Augustyn Abel J. Mattos Mark S. Miskovsky

Committee on Criminal Law Hon. Paul G. Cassell, Chair	John M. Hughes James C. Oleson
Committee on Defender Services Hon. John Gleeson, Chair	Theodore A. Lidz Steven G. Asin Carole W. Cheatham Richard A. Wolff
Committee on Federal-State Jurisdiction Hon. Howard D. McKibben, Chair	
Committee on Information Technology Hon. Thomas I. Vanaskie, Chair	Melvin J. Bryson Terry A. Cain Michel M. Ishakian Penny White
Committee on Intercircuit Assignments Hon. Royce C. Lamberth, Chair	Margaret A. Irving Patrick Walker
Committee on the Judicial Branch Hon. D. Brock Hornby, Chair	Steven Tevlowitz
Committee on Judicial Resources Hon. W. Royal Furgeson, Jr., Chair	Charlotte G. Peddicord William P. Ard Dan Jensen Nancy E. Ward
Committee on Judicial Security Hon. David Bryan Sentelle, Chair	Ross Eisenman Melanie F. Gilbert Linda Holz
Committee on the Administration of the Magistrate Judges System Hon. Nina Gershon, Chair	Thomas C. Hnatowski Charles E. Six

Committee on Rules of Practice and Procedure
Hon. David F. Levi, Chair

Peter G. McCabe

Committee on Space and Facilities
Hon. Jane R. Roth, Chair

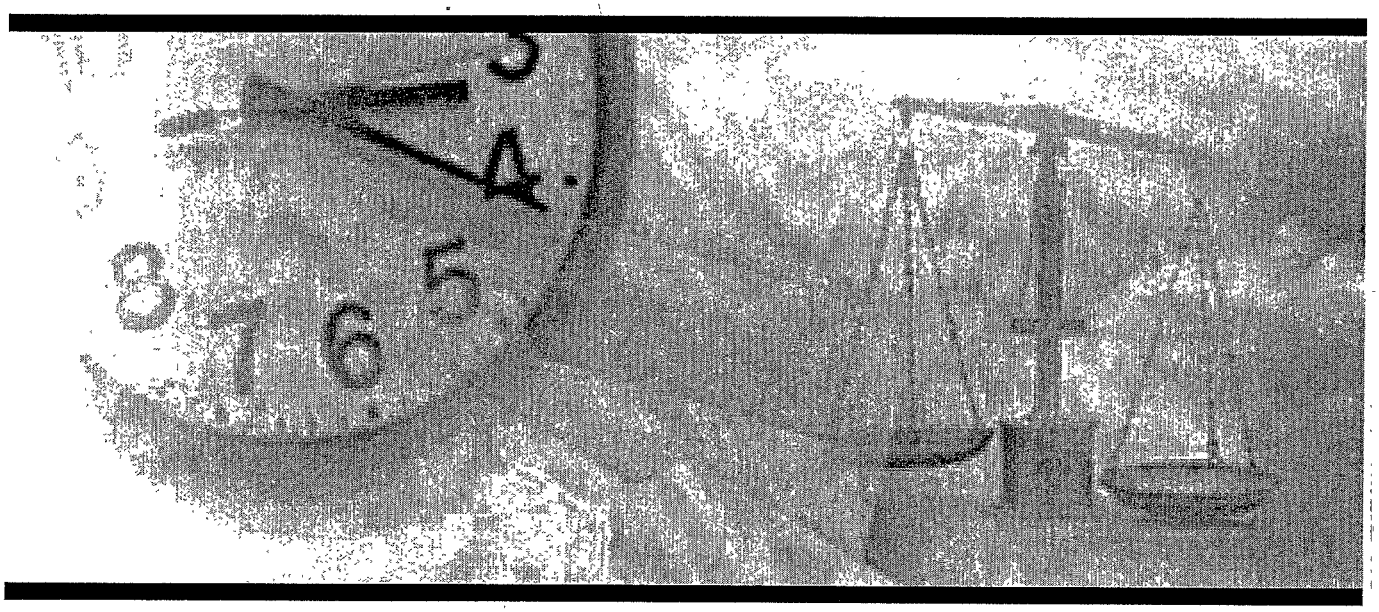
Ross Eisenman
Melanie F. Gilbert
Linda Holz

Other Administrative Office staff in attendance:

Steven G. Gallagher
Robert Lowney

Glen K. Palman
Leeann R. Yufanyi

Appendix B



Strategic Planning Issues of the Committees of the Judicial Conference of the United States

August 2003

Administrative Office of the U.S. Courts

Long-Range Planning Office

Key Crosscutting Strategic Issues

- Preserving the quality of justice and the excellence of judicial services
- Coping with changing work and increasing workload
- Preparing for future challenges to the judiciary's ability to obtain needed resources
- Managing resources effectively
- Maintaining effective judicial governance and management mechanisms
- Making effective use of technology and information and planning for the impact of technology
- Preserving judicial independence and maintaining effective external communications and relationships
- Attracting and retaining a highly competent and diverse workforce
- Addressing security and anti-terrorism issues and concerns

Committee Strategic Issues

Committee on the Administrative Office

- The importance of addressing security concerns and assisting courts with emergency planning.
- The changing methods of communicating information to the courts, particularly the increased use of electronic forms of communication.
- The need to work with the Judicial Conference committees and the courts to prepare for possible future budget pressures.
- The importance of enhancing oversight and internal controls to protect judiciary resources.
- Maintaining excellent service by the AO to the courts.
- Attracting and maintaining an excellent workforce.
- Ensuring effective allocation of resources.

Committee on the Administration of the Bankruptcy System

- Continuity of operations in the event of a disaster.
- Security of bankruptcy proceedings (including such activities as meetings of creditors that take place away from the courthouse) and the effect of increased security on the operation of the courts.
- Mitigation of the impact on the quality of justice in the event that the judiciary's budget is not increased, or is actually decreased, in the future.
- Flexibility in the deployment of judge resources in light of the volatility of bankruptcy case filings.
- Considering the potential impact of pending bankruptcy reform legislation.
- Obtaining additional bankruptcy judgeships.
- Meeting the need for more statistical information on the bankruptcy system.
- Managing changes in bankruptcy judges' work due to the advent of electronic case files in the bankruptcy courts.

Committee on the Budget

- The possibility of serious budget constraints, given the likelihood that the historical growth rates that the judiciary's budget has seen in the recent past are not likely to be sustainable in the coming years.
- Security concerns and their impact on future budgets, especially in view of terrorism.
- Improving compensation for judges.

Committee on Court Administration and Case Management

- The need of the court system to provide court information in languages other than English and to address cultural and language differences to ensure accurate translations and meaningful access to the federal courts for all citizens.
- The need to determine the impact of an aging society on the federal court system.
- The need to determine if and whether the court system can alter its structure to address the projected population shift to western and southern states.
- The need to preserve respect for an independent judiciary and its importance in a democratic government.
- The need to prepare for a more stringent budget environment and to develop a plan to operate with reduced funds.
- The need to be able to easily explain to Congress and others the budgetary needs of the courts and to attempt to develop ways to stem the growth of the federal judiciary's budget (i.e., shared administrative services).
- The need to preserve the human face of the judiciary while also using technology in the most efficient and effective means in all areas of court operations.

Committee on Criminal Law

- Consider the impact of the increased workload associated with supervision violation proceedings.
- Periodically identify and consider long-range proposals that could affect program costs.
- Understanding the future needs of the probation and pretrial services system.

Committee on Defender Services

- Availability and quality of Criminal Justice Act services.
- Impact of technology on Criminal Justice Act services.
- Developing and sustaining a diverse workforce for the future.
- Maintaining the independence of the defense function.
- Death penalty representation under the Criminal Justice Act and related statutes.
- Learning from and assisting other appointed counsel systems - the role of the right to counsel in democracies.

Committee on Federal-State Jurisdiction

- Guarding against expansion of federal jurisdiction that would be inconsistent with principles of judicial federalism.
- Identifying problem areas in federal jurisdiction that could be addressed through legislation.
- Fostering communication between state and federal judiciaries.

Committee on Information Technology

- Use of technology to improve business processes in the judiciary.
- Ensuring the continuity of critical operations.
- Providing appropriate electronic access to information to all users who do business with the courts and the public at large.
- Providing IT training and support that is responsive to customer needs.
- Implementing a uniform enterprise-wide technology architecture.
- Upgrading the IT infrastructure to ensure that it has adequate security safeguards.
- Upgrading IT applications to increase efficiency and effectiveness of the judiciary's core processes.

Committee on the Judicial Branch

- Increasing judicial compensation to continue to ensure quality of justice.
- Identifying other matters of welfare to judges including enhanced benefits.
- Ensuring that the judiciary has a strong public image.

Committee on Judicial Resources

- Preparing for budget constraints: controlling personnel costs and improving productivity.
- Remaining competitive as an employer.
- Understanding the workforce implications of new systems and changing technologies.

Committee on Judicial Security

- Planning for security resources effectively.

Committee on the Administration of the Magistrate Judges System

- Appropriate limits on magistrate judge numbers and authority.
- Roles of magistrate judges in court governance.
- Appropriate chambers staffing for magistrate judges.
- Contributions of magistrate judges to the quality of justice.
- The evaluation of full, fair, and effective utilization of magistrate judges.
- Helping courts obtain the greatest benefit from their magistrate judges.

Committee on Rules of Practice and Procedure

- Restyling of the rules for consistency and readability.
- Impact of technology on rules.
- Analyzing local rules of court for consistency with national rules.
- Upholding the integrity of the rules process.
- Seeking greater participation in the rulemaking process by bench, bar, and public.

Committee on Space and Facilities

- Planning comprehensively for housing the federal courts.
- Dealing with GSA restructuring and downsizing.
- Assessing the impact of technology on the security and facilities programs.

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 22-23, 2006
Volume II

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 22-23, 2006

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1. Opening Remarks of the Chair

   A. Report on the March 2006 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2006 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center (Oral report)

5. Report of the Technology Subcommittee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed uniform rules' amendments governing privacy and security concerns arising from electronic filings with the court in accordance with the E-Government Act of 2002
   B. Text of amendments to Appellate, Bankruptcy, Civil, and Criminal Rules implementing E-Government Act

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule 25(a)(5) implementing E-Government Act
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 29 and 41
   C. Minutes and other informational items

8. Report of the Evidence Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed new Rule 502
   B. Minutes and other informational items

9. Time-Computation Subcommittee Report

10. Long-Range Planning Report

VOLUME II

11. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1014, 3007, 4001, 6006, and 7007.1, and proposed new Rules 6003, 9005.1, and 9037
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011
   C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Interim Rule 1007
   D. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1
   E. **ACTION** – Approving publishing for public comment proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, 24, new Exhibit D to Official Forms 1, 25A, 25B, and 26
   F. Minutes and other informational items

VOLUME III

12. Report of the Civil Rules Committee

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed new Rule 5.2
   B. **ACTION** — Approving and transmitting to the Judicial Conference proposed restyled Rules 1-86
   C. **ACTION** — Approving and transmitting to the Judicial Conference proposed style/substance amendments to Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78

D. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes of Civil Forms

E. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes to the electronic discovery amendments involving Rules 16, 26, 33, 34, 37, and 45

F. **ACTION** – Approving publishing for public comment proposed amendments to Rules 6, 13, 15, and 48, and proposed new Rule 62.1

G. Minutes and other informational items

13. Next Meeting: January

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Thomas S. Zilly, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 24, 2006**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. INTRODUCTION

The Advisory Committee on Bankruptcy Rules met on March 8-10, 2006, in Chapel Hill, North Carolina. As a result of that meeting and other actions, the Advisory Committee recommends a series of Action Items to the Standing Committee. First, the Committee recommends that the Standing Committee finally approve and recommend to the Judicial Conference the rules set out in Part II.A.3 of this report. Second, the Committee recommends that the Standing Committee approve for publication in August 2006 the proposed new and amended rules set out in Part II.B.2 of this report. Third, we recommend amending Interim Rule 1007, to be effective on October 1, 2006, as set out in Part II.B.4. Fourth, the Committee recommends that the Standing Committee approve the proposed amendments to the Official Forms in Part II.C.2 of the report and submit them to the Judicial Conference for its approval with an effective date of October 1, 2006. Finally, the Advisory Committee recommends that the new and amended Official Forms as set out in Part II.D.2 of the report be approved for publication in August 2006. Parts II.C.2 and II.D.2 are set out in a separate attachment.

The Advisory Committee considered public comments regarding the proposed amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Rules 6003, 9005.1, and 9037 that were published in August 2005. The Advisory Committee received a number of comments on the proposed amendments to the Rules, and the comments are summarized later in this report. Since no person who submitted a written comment requested to appear at the public hearing scheduled for January 9, 2006, the hearing was canceled. The Advisory Committee recommends that the proposed

amendments and additions to the Bankruptcy Rules set out in Part II.A.3 be approved for transmittal to the Judicial Conference.

In addition to these new rules and amendments, a proposed amendment to Bankruptcy Rule 3001 was published for comment in August 2005. The Advisory Committee recommends that the proposed amendments to Rule 3001 be withdrawn. The Committee received several comments opposing the recommended amendments to the rule that would have limited the length of documents that could be attached to a proof of claim. After further consideration of those comments, the Advisory Committee concluded that the proposed amendment should be withdrawn.

The Advisory Committee has spent considerable time on the creation of Interim Rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Act). President Bush signed the 2005 Act on April 20, 2005, and most of its provisions became effective on October 17, 2005. The Advisory Committee prepared Interim Rules to operate in cases governed by the 2005 Act until final rules could be put in place. The Interim Rules were approved by the Standing Committee and were adopted by standing order in every district in the United States. These adoptions were nearly uniform throughout the country with only a few minor variations in the rules as locally adopted. The Interim Rules comprise the bulk of the package of new rules and rules amendments being recommended for publication.

The proposed rules recommended for publication also include amendments and additions that were not included in the package of Interim Rules that became effective by standing orders on October 17, 2005. For example, one provision of the 2005 Act does not become effective until a rule has been promulgated under the Rules Enabling Act process. Consequently, there was no need to include that rule in the Interim Rules, but the changes in the Bankruptcy Code require the adoption of new rules to implement those provisions. The Committee received and considered various comments to the Interim Rules prior to its meeting in March, and the proposed Rules have incorporated these comments as appropriate.

The report includes a statement at the end of each rule or rule amendment being recommended for publication as to whether the proposal was previously approved as an Interim Rule. That statement also identifies any changes in the recommended version of the rule to the existing Interim Rule. While there were changes to many of the Interim Rules, most of the changes were stylistic. More significant amendments were made to Interim Rules 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5). The amendments to Rules 1005, 2015.3, 3016(d), 5001, and 9009 are entirely new and were not included in the Interim Rules. The 2005 Act requires the amendments to Rules 1005, 2015.3, 3016(d) and 9009, while the amendments to Rule 5001 are necessary because of the amendment to 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside of their districts in emergency situations. Attached to the report is a chart that states the number of the rule being proposed for publication, whether a change in the rule was required by the 2005 Act, whether it was an Interim Rule, and the extent of the change in the rule from the Interim Rule. These rules are set out in Part II.B.2 of the report.

Part II.B.4 contains amendments to Bankruptcy Rule 1007 that are being recommended both for inclusion in the rules for publication and for approval as an Interim Rule that can be recommended to the bankruptcy courts for adoption by standing order in the manner that the Interim Rules were adopted prior to October 17, 2005. The 2005 Act amended the Bankruptcy Code to require that consumer debtors receive credit counseling prior to commencing a bankruptcy case. Interim Rule 1007 implements that provision by requiring debtors to file a certificate that they have completed the counseling in the 180 days prior to the commencement of the case. Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate. The proposed amendment to Interim Rule 1007(b) and (c) addresses the problem by permitting debtors in this position to make a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor has until 15 days after the filing of the petition to file the certificate with the court.

In tandem with this proposed amendment to the Interim Rule 1007, the Advisory Committee recommends a change to Official Form 1, the voluntary petition, for approval by the Standing Committee and for recommendation for adoption by the Judicial Conference, with an effective date of October 1, 2006. The amendment to the Official Form includes a change that implements the amendment to Interim Rule 1007(b)(3) and also includes a series of cautions intended to inform debtors of the consequences of the filing of a bankruptcy petition. Many pro se debtors are unaware of the significant adverse consequences of filing a petition, and the warnings may deter improvident or premature filings. This will reduce the harm to those debtors as well as ease burdens on clerks who often are called upon to respond to inquiries from debtors on these matters.

In addition to the proposed amendment to Official Form 1, the Advisory Committee recommends changes to several other Official Forms also with an effective date of October 1, 2006. These amendments, which are described in Section II.C.1, implement the substantial new statistical reporting requirements in the 2005 Act. They are set out in a separate attachment.

The 2005 Act also required the amendment or creation of many Official Forms. Because the forms must be uniform to be truly useful in cases, the amendments and additions to the forms were recommended to the Judicial Conference for its approval in August and October of 2005. The Judicial Conference approved the forms which became effective on October 17, 2005. Time did not allow for the publication of these forms for comment, so the Advisory Committee recommends that the Official Forms that became effective on October 17, 2005, be published for comment along with the Interim Rules. As with the Interim Rules, the Official Forms being proposed for publication also include some minor amendments from those currently in use. The use of the Official Forms and Interim Rules since October 2005 provides a unique opportunity for the Advisory Committee to evaluate the proposed rules and the Official Forms and should enable the bench and bar to offer especially valuable commentary on their workings. The amendments and additions to the Official Forms which are recommended for publication are described in Part II.C.1. Due to their length, these materials are set out in a separate attachment.

11-A

II. ACTION ITEMS

A. Proposed Amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1, and new Rules 6003, 9005.1, and 9037 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments and new rules for submission to the Judicial Conference.

1. *Public Comment and Hearing.*

The proposed amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, and 7007.1 and new Rules 6003, 9005.1, and 9037 were published for comment in August 2005. A public hearing on the proposed amendments was scheduled for January 9, 2006, but there were no requests to appear at the hearing.

2. *Synopsis of Proposed Amendments.*

(a) Rule 1014 is amended to state explicitly that the court can order the change of venue of a case on its own motion.

(b) Rule 3007 is amended to prohibit a party in interest from including in a claim objection a request for relief that requires an adversary proceeding. The rule is also amended to allow omnibus claims objections which can include up to 100 claims in a single filed objection to claims. The rule limits the nature of objections that may be joined in the single filing, and it also establishes minimum standards that are intended to ensure the protection of the due process rights of the claimants.

(c) Rule 4001 is amended to require movants seeking approval of agreements relating to the automatic stay, approval of certain other agreements, or authority to use cash collateral or obtain credit submit along with the motion a proposed order for the relief requested and to provide more extensive notice to parties in interest of the requested relief. The rule requires the movant to include within the motion a statement not to exceed five pages that concisely describes the material provisions of the relief requested.

(d) Rule 6003 is new. It sets limits on the granting of certain relief by the court during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, the court cannot grant relief on applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate other than such a motion under Rule 4001, and motions

to assume or assign executory contracts and unexpired leases for the first 20 days of the case.

(e) Rule 6006 is amended to authorize omnibus motions to reject executory contracts and unexpired leases. It also authorizes omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The rule establishes minimum standards that are intended to ensure the protection of the due process rights of the claimants.

(f) Rule 7007.1 is amended to provide that a party must file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

(g) Rule 9005.1 is new. It makesRule 5.1 F. R. Civ. P. applicable to all contested matters and other proceedings within the bankruptcy case.

(h) Rule 9037 is new. It is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Consistent with amendments to the Federal Rules of Appellate, Civil and Criminal Procedure, this rule protects the privacy and security concerns that arise from the filing of documents, both electronically and in paper form, with the court.

3. *Text of Proposed Amendments to Rules 1014, 3007, 4001, 6003, 6006, 7007.1, 9005.1 and 9037.*

PROPOSED AMENDMENTS TO THE FEDERAL RULES BANKRUPTCY PROCEDURE*

Rule 1014. Dismissal and Change of Venue

1 (a) DISMISSAL AND TRANSFER OF CASES.

2 (1) *Cases Filed in Proper District.*

3 If a petition is filed in the proper district, the court, on the

4 timely motion of a party in interest or on its own motion, and

5 after hearing on notice to the petitioners, the United States

*New material is underlined; matter to be omitted is lined through.

6 trustee, and other entities as directed by the court, may
7 transfer the case ~~may be transferred~~ to any other district if the
8 court determines that the transfer is in the interest of justice or
9 for the convenience of the parties.

10 (2) *Cases Filed in Improper District.*

11 If a petition is filed in an improper district, the court, on
12 the timely motion of a party in interest or on its own motion,
13 and after hearing on notice to the petitioners, the United
14 States trustee, and other entities as directed by the court, may
15 dismiss the case or transfer it ~~the case may be dismissed or~~
16 ~~transferred~~ to any other district if the court determines that
17 transfer is in the interest of justice or for the convenience of
18 the parties.

19 * * * * *

COMMITTEE NOTE

Courts have generally held that they have the authority to dismiss or transfer cases on their own motion. The amendment recognizes this authority and also provides that dismissal or transfer of the case may take place only after notice and a hearing.

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 1014:

1. Mr. Anthony Sabino, a bankruptcy practitioner and professor in New York, wholeheartedly supported the rule in **Comment 05-BK-005**.

Changes Made After Publication:

No changes since publication.

Rule 3007. Objections to Claims

1 (a) OBJECTIONS TO CLAIMS. An objection to the
2 allowance of a claim shall be in writing and filed. A copy of
3 the objection with notice of the hearing thereon shall be
4 mailed or otherwise delivered to the claimant, the debtor or
5 debtor in possession, and the trustee at least 30 days prior to

6 the hearing. ~~If an objection to a claim is joined with a~~
7 ~~demand for relief of the kind specified in Rule 7001, it~~
8 ~~becomes an adversary proceeding.~~
9 (b) DEMAND FOR RELIEF REQUIRING AN
10 ADVERSARY PROCEEDING. A party in interest shall not
11 include a demand for relief of a kind specified in Rule 7001
12 in an objection to the allowance of a claim, but may include
13 the objection in an adversary proceeding.
14 (c) LIMITATION ON JOINDER OF CLAIMS
15 OBJECTIONS. Unless otherwise ordered by the court or
16 permitted by subdivision (d), objections to more than one
17 claim shall not be joined in a single objection.
18 (d) OMNIBUS OBJECTION. Subject to subdivision (e),
19 objections to more than one claim may be joined in an
20 omnibus objection if all the claims were filed by the same

21 entity, or the objections are based solely on the grounds that
22 the claims should be disallowed, in whole or in part, because:
23 (1) they duplicate other claims;
24 (2) they have been filed in the wrong case;
25 (3) they have been amended by subsequently filed
26 proofs of claim;
27 (4) they were not timely filed;
28 (5) they have been satisfied or released during the
29 case in accordance with the Code, applicable rules, or a court
30 order;
31 (6) they were presented in a form that does not
32 comply with applicable rules, and the objection states that the
33 objector is unable to determine the validity of the claim
34 because of the noncompliance;
35 (7) they are interests, rather than claims; or

36 (8) they assert priority in an amount that exceeds the
37 maximum amount under § 507 of the Code.
38 (e) REQUIREMENTS FOR OMNIBUS OBJECTION.
39 An omnibus objection shall:
40 (1) state in a conspicuous place that claimants
41 receiving the objection should locate their names and claims
42 in the objection;
43 (2) list claimants alphabetically, provide a cross-
44 reference to claim numbers, and, if appropriate, list claimants
45 by category of claims;
46 (3) state the grounds of the objection to each claim
47 and provide a cross-reference to the pages in the omnibus
48 objection pertinent to the stated grounds;
49 (4) state in the title the identity of the objector and the
50 grounds for the objections;

51 (5) be numbered consecutively with other omnibus

52 objections filed by the same objector; and

53 (6) contain objections to no more than 100 claims.

54 (f) FINALITY OF OBJECTION. The finality of any

55 order regarding a claim objection included in an omnibus

56 objection shall be determined as though the claim had been

subject to an individual objection.

COMMITTEE NOTE

The rule is amended in a number of ways. First, the amendment prohibits a party in interest from including in a claim objection a request for relief that requires an adversary proceeding. A party in interest may, however, include an objection to the allowance of a claim in an adversary proceeding. Unlike a contested matter, an adversary proceeding requires the service of a summons and complaint, which puts the defendant on notice of the potential for an affirmative recovery. Permitting the plaintiff in the adversary proceeding to include an objection to a claim would not unfairly surprise the defendant as might be the case if the action were brought as a contested matter that included an action to obtain relief of a kind specified in Rule 7001.

The rule as amended does not require that a party include an objection to the allowance of a claim in an adversary proceeding. If

a claim objection is filed separately from a related adversary proceeding, the court may consolidate the objection with the adversary proceeding under Rule 7042.

The rule also is amended to authorize the filing of a pleading that joins objections to more than one claim. Such filings present a significant opportunity for the efficient administration of large cases, but the rule includes restrictions on the use of these omnibus objections to ensure the protection of the due process rights of the claimants.

Unless the court orders otherwise, objections to more than one claim may be joined in a single pleading only if all of the claims were filed by the same entity, or if the objections are based solely on the grounds set out in subdivision (d) of the rule. Objections of the type listed in subdivision (d) often can be resolved without material factual or legal disputes. Objections to multiple claims permitted under the rule must comply with the procedural requirements set forth in subdivision (e). Among those requirements is the requirement in subdivision (e)(5) that these omnibus objections be consecutively numbered. Since these objections may not join more than 100 objections in any one omnibus objection, there may be a need for several omnibus objections to be filed in a particular case. Consecutive numbering of each omnibus objection and the identification of the objector in the title of the objection is essential to keep track of the objections on the court's docket. For example, the objections could be titled Debtor in Possession's First Omnibus Objection to Claims, Debtor in Possession's Second Omnibus Objection to Claims, Creditors' Committee's First Omnibus Objection to Claims, and so on. Titling the objections in this manner

should avoid confusion and aid in tracking the objections on the docket.

Subdivision (f) provides that an order resolving an objection to any particular claim is treated, for purposes of finality, as if the claim had been the subject of an individual objection. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other joined objections. The rule permits the joinder of objections for convenience, and that convenience should not impede timely review of a court's decision with respect to each claim. Whether the court's action as to a particular objection is final, and the consequences of that finality, are not addressed by this amendment. Moreover, use of an omnibus objection generally does not preclude the objecting party from raising a subsequent objection to the claim on other grounds. See Restatement (Second) of Judgments § 26(1)(d) (1982) (generally applicable rule barring multiple actions based on same transaction or series of transactions is overridden when a statutory scheme permits splitting of claims).

Public Comment on Proposed Amendments to Rule 3007:

1. Mr. Jack Horsley, **Comment 05-BK-002**, offered several comments on the proposal. Most significantly, he suggested that the rule be amended to set a specific deadline for the timely filing of a proof of claim.

2. Mr. Anthony Sabino, a bankruptcy practitioner and professor in New York, supported the rule in Comment **05-BK-005**, but he also recommended adding a subdivision (g) to the rule that would authorize the courts to impose

additional limits or conditions on the use of omnibus claims objections "when the interests of justice so require."

3. Hon. Robert E. Grant, United States Bankruptcy Judge for the Northern District of Indiana, submitted Comment **05-BK-011**. He urged that the rule should prohibit omnibus claims objections unless specific cause for their allowance can be established. He also argued that there is no need to permit omnibus objections based on the replacement of a proof of claim by a subsequently filed proof of claim, so he suggested removing that ground from the list of objections that may be joined. He also objected to the statement in the Committee Note that § 502(j) of the Bankruptcy Code authorizes the filing of subsequent objections to the same claim with the objection being based on different grounds.

Changes Made After Publication:

There were several changes made to the rule after its publication. The Advisory Committee declined to follow Mr. Sabino's suggestion, concluding that the rule as proposed includes sufficient flexibility, and that expanding the flexibility might lead to excessive deviation from the appropriate format for omnibus claims objections. The Advisory Committee also declined to follow Mr. Horsley's suggestion because the deadline for filing a proof of claim varies based on the nature of the creditor (governmental units have different deadlines from other creditors) as well as on the chapter under which the case is pending. The Advisory Committee rejected Judge Grant's suggestion that a party proposing an omnibus claims objection be required to demonstrate some special cause to allow the joinder of the objections. The Advisory Committee concluded that

the rule includes sufficient protections for claimants such that omnibus objections should be allowed without the need for a special showing by the claims objector that joinder is proper.

The Advisory Committee did accept several of Judge Grant's suggestions, and the rule was amended by deleting the grounds for objection to claims based on the filing of a superceding proof of claim under proposed subdivision (d)(3) and the transfer of claims under proposed subdivision (d)(4). Subdivision (d)(3) now permits objections to claims that have been amended by a subsequently filed proof of claim and the paragraphs within subdivision (d) have been renumbered to reflect the deletion. The Committee Note also no longer includes any reliance on § 502 (j) for the statement indicating that a subsequent claim objection can be filed to a claim that was previously included in an omnibus claim objection.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

1 * * * * *

2 (b) USE OF CASH COLLATERAL.

3 (1) *Motion; Service.*

4 (A) Motion. A motion for ~~authorization~~ authority

5 to use cash collateral shall be made in accordance with Rule

6 9014 and shall be accompanied by a proposed form of order
7 ~~served on any entity which has an interest in the cash~~
8 ~~collateral, on any committee elected pursuant to § 705 or~~
9 ~~appointed pursuant to § 1102 of the Code or its authorized~~
10 ~~agent, or, if the case is a chapter 9 municipality case or a~~
11 ~~chapter 11 reorganization case and no committee of unsecured~~
12 ~~creditors has been appointed pursuant to § 1102, on the~~
13 ~~creditors included on the list filed pursuant to Rule 1007(d),~~
14 ~~and on such other entities as the court may direct~~.
15 (B) Contents. The motion shall consist of or (if
16 the motion is more than five pages in length) begin with a
17 concise statement of the relief requested, not to exceed five
18 pages, that lists or summarizes, and sets out the location
19 within the relevant documents of, all material provisions,
20 including:

21 (1) the name of each entity with an interest in
22 the cash collateral;
23 (2) the purposes for the use of the cash
24 collateral;
25 (3) the material terms, including duration, of
26 the use of the cash collateral; and
27 (4) any liens, cash payments, or other
28 adequate protection that will be provided to each entity with
29 an interest in the cash collateral or, if no additional adequate
30 protection is proposed, an explanation of why each entity's
31 interest is adequately protected.
32 (C) Service. The motion shall be served on:
33 (1) any entity with an interest in the cash collateral; (2) any
34 committee elected under § 705 or appointed under § 1102 of
35 the Code, or its authorized agent, or, if the case is a chapter 9
36 municipality case or a chapter 11 reorganization case and no

37 committee of unsecured creditors has been appointed under
38 § 1102, the creditors included on the list filed under Rule
39 1007(d); and (3) any other entity that the court directs.
40 * * * * *
41 (c) OBTAINING CREDIT.
42 (1) *Motion; Service.*
43 (A) Motion. A motion for authority to obtain
44 credit shall be made in accordance with Rule 9014 and shall
45 be accompanied by a copy of the credit agreement and a
46 proposed form of order ~~served on any committee elected~~
47 ~~pursuant to § 705 or appointed pursuant to § 1102 of the Code~~
48 ~~or its authorized agent, or, if the case is a chapter 9~~
49 ~~municipality case or a chapter 11 reorganization case and no~~
50 ~~committee of unsecured creditors has been appointed pursuant~~
51 ~~to § 1102, on the creditors included on the list filed pursuant~~
52 ~~to Rule 1007(d), and on such other entities as the court may~~

53 ~~direct. The motion shall be accompanied by a copy of the~~
54 ~~agreement~~ .

55 (B) Contents. The motion shall consist of or (if
56 the motion is more than five pages in length) begin with a
57 concise statement of the relief requested, not to exceed five
58 pages, that lists or summarizes, and sets out the location
59 within the relevant documents of, all material provisions of
60 the proposed credit agreement and form of order, including
61 interest rate, maturity, events of default, liens, borrowing
62 limits, and borrowing conditions. If the proposed credit
63 agreement or form of order includes any of the provisions
64 listed below, the concise statement shall also: briefly list or
65 summarize each one; identify its specific location in the
66 proposed agreement and form of order; and identify any such
67 provision that is proposed to remain in effect if interim
68 approval is granted, but final relief is denied, as provided

69 under Rule 4001(c)(2). In addition, the motion shall describe
70 the nature and extent of each provision listed below:
71 (1) a grant of priority or a lien on property of
72 the estate under § 364(c) or (d);
73 (2) the providing of adequate protection or
74 priority for a claim that arose before the commencement of
75 the case, including the granting of a lien on property of the
76 estate to secure the claim, or the use of property of the estate
77 or credit obtained under § 364 to make cash payments on
78 account of the claim;
79 (3) a determination of the validity,
80 enforceability, priority, or amount of a claim that arose before
81 the commencement of the case, or of any lien securing the
82 claim;
83 (4) a waiver or modification of Code
84 provisions or applicable rules relating to the automatic stay;

85 (5) a waiver or modification of any entity's
86 authority or right to file a plan, seek an extension of time in
87 which the debtor has the exclusive right to file a plan, request
88 the use of cash collateral under § 363(c), or request authority
89 to obtain credit under § 364;
90 (6) the establishment of deadlines for filing a
91 plan of reorganization, for approval of a disclosure statement,
92 for a hearing on confirmation, or for entry of a confirmation
93 order;
94 (7) a waiver or modification of the
95 applicability of nonbankruptcy law relating to the perfection
96 of a lien on property of the estate, or on the foreclosure or
97 other enforcement of the lien;
98 (8) a release, waiver, or limitation on any
99 claim or other cause of action belonging to the estate or the

100 trustee, including any modification of the statute of
101 limitations or other deadline to commence an action;
102 (9) the indemnification of any entity;
103 (10) a release, waiver, or limitation of any
104 right under § 506(c); or
105 (11) the granting of a lien on any claim or
106 cause of action arising under §§ 544, 545, 547, 548, 549,
107 553(b), 723(a), or 724(a).
108 (C) Service. The motion shall be served on:
109 (1) any committee elected under § 705 or appointed under
110 § 1102 of the Code, or its authorized agent, or, if the case is
111 a chapter 9 municipality case or a chapter 11 reorganization
112 case and no committee of unsecured creditors has been
113 appointed under § 1102, on the creditors included on the list
114 filed under Rule 1007(d); and (2) on any other entity that the
115 court directs.

116 * * * * *

117 (d) AGREEMENT RELATING TO RELIEF FROM
118 THE AUTOMATIC STAY, PROHIBITING OR
119 CONDITIONING THE USE, SALE, OR LEASE OF
120 PROPERTY, PROVIDING ADEQUATE PROTECTION,
121 USE OF CASH COLLATERAL, AND OBTAINING
122 CREDIT.

123 (1) *Motion; Service.*

124 (A) Motion. A motion for approval of ~~an~~
125 ~~agreement~~ any of the following shall be accompanied by a
126 copy of the agreement and a proposed form of order:

127 ~~(A)~~ (1) an agreement to provide adequate
128 protection~~;~~ ;

129 ~~(B)~~ (2) an agreement to prohibit or condition
130 the use, sale, or lease of property~~;~~ ;

131 ~~(C)~~ (3) an agreement to modify or terminate
132 the stay provided for in § 362~~;~~ ;
133 ~~(D)~~ (4) an agreement to use cash collateral~~;~~ ;
134 or
135 ~~(E)~~ (5) an agreement between the debtor and
136 an entity that has a lien or interest in property of the estate
137 pursuant to which the entity consents to the creation of a lien
138 senior or equal to the entity's lien or interest in such property~~.~~
139 ~~shall be served on any committee elected pursuant to § 705 or~~
140 ~~appointed pursuant to § 1102 of the Code or its authorized~~
141 ~~agent, or, if the case is a chapter 9 municipality case or a~~
142 ~~chapter 11 reorganization case and no committee of unsecured~~
143 ~~creditors has been appointed pursuant to § 1102, on the~~
144 ~~creditors included on the list filed pursuant to Rule 1007(d),~~
145 ~~and on such other entities as the court may direct. The motion~~

146 ~~shall be accompanied by a copy of the agreement and a~~
147 ~~proposed form of order~~.
148 (B) Contents. The motion shall consist of or (if
149 the motion is more than five pages in length) begin with a
150 concise statement of the relief requested, not to exceed five
151 pages, that lists or summarizes, and sets out the location
152 within the relevant documents of, all material provisions of
153 the agreement. In addition, the concise statement shall briefly
154 list or summarize, and identify the specific location of, each
155 provision in the proposed form of order, agreement, or other
156 document of the type listed in subdivision (c)(1)(B). The
157 motion shall also describe the nature and extent of each such
158 provision.
159 (C) Service. The motion shall be served on:
160 (1) any committee elected under § 705 or appointed under
161 § 1102 of the Code, or its authorized agent, or, if the case is

162 a chapter 9 municipality case or a chapter 11 reorganization
163 case and no committee of unsecured creditors has been
164 appointed under § 1102, on the creditors included on the list
165 filed under Rule 1007(d); and (2) on any other entity the court
166 directs.

* * * * *

COMMITTEE NOTE

The rule is amended to require that parties seeking authority to use cash collateral, to obtain credit, and to obtain approval of agreements to provide adequate protection, modify or terminate the stay, or to grant a senior or equal lien on property, submit with those requests a proposed order granting the relief, and that they provide more extensive notice to interested parties of a number of specified terms. The motion must either not exceed five pages in length, or, if it is longer, begin with a concise statement of five pages or less, that summarizes or lists the material provisions and which will assist the court and interested parties in understanding the nature of the relief requested. The concise statement must also set out the location within the documents of the summarized or listed provisions. The parties to agreements and lending offers frequently have concise summaries of their transactions that contain a list of the material provisions of the agreements, even if the agreements themselves are very lengthy. A similar summary should allow the court and interested parties to understand the relief requested.

In addition to the concise statement, the rule requires that motions under subdivisions (c) and (d) state whether the movant is seeking approval of any of the provisions listed in subdivision (c)(1)(B), and where those provisions are located in the documents. The rule is intended to enhance the ability of the court and interested parties to find and evaluate those provisions.

The rule also provides that any motion for authority to obtain credit must identify any provision listed in subdivision (c)(1)(B)(1)-(11) that is proposed to remain effective if the court grants the motion on an interim basis under Rule 4001(c)(2), but later denies final relief.

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 4001:

1. Hon. Marvin Isgur, United States Bankruptcy Judge for the Southern District of Texas, in **Comment 05-BK-004** expressed concern that the proposed amendments would unduly restrict accepted and appropriate practices in consumer bankruptcy cases. The proposed amendments may be well suited for large chapter 11 cases, but the amended rule would render the forms in use in consumer cases in violation of the rule. He suggested that the rule be amended to except individual debtor cases from the operation of the rule.

2. Mr. Anthony Sabino of the New York bar said in **Comment 05-BK-005** that the proposed changes to the rule were excellent.

3. The National Bankruptcy Conference ("NBC") submitted an extensive comment on the proposed rule. In **Comment 05-BK-007** it asserted that the three-page limit for the introductory statement in the motion was insufficient to describe the material provisions of the relevant documents. It also argued that the rule should distinguish between interim and final relief and that the extent of notice and opportunity to be heard on the matters should be tailored to the form of those requests. The NBC also objected to the provision in the proposed rule that requires the movant to set out the reasons why certain terms were included in the proposed agreements between the parties. The NBC recommended the addition of a paragraph in subdivision (c)(1)(B) that would require the movant to include the identification and explanation of any provision in the proposed agreement or order that set deadlines for filing plans or related matter. It also recommended that subdivision (c)(1)(B) be amended to require the movant to state whether any relief being requested on an interim basis would remain in effect even if the court refused to approve the movant's request for permanent relief. The NBC also objected to the inclusion of the reference to Rule 9024 in subdivision (c)(1)(C) which recognizes the court's authority to provide relief from a prior order approving a request to obtain credit. It suggested that such a provision will create an unnecessarily high level of uncertainty about postpetition lending that will be detrimental to the operation of chapter 11 cases. The NBC also offered several technical changes to the language of the proposed rule.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Changes Made After Publication:

1. The introductory language in subdivisions (b)(1)(B), (c)(1)(B), and (d)(1)(B) was revised to clarify that the motions filed under the rule can be either no more than five pages long or begin with a concise statement of that length. This permits the continued use of forms that have been effective in smaller cases. Subdivision (c)(1)(B) also is amended to require that the motion identify any provisionally approved term that would remain in effect even if the court denies the permanent relief requested.

2. A new subparagraph (c)(1)(B)(6) was inserted into the rule and the remaining subparagraphs were renumbered accordingly. The new subparagraph requires that the motion identify any provisions setting deadlines for filing and confirming reorganization plans and disclosure statements.

3. Subdivisions (c)(1)(C) and (d)(1)(C) of the proposed rule were deleted as unnecessary. The court has whatever authority Rule 9024 provides, and making an explicit reference to that rule in these subdivisions brings unnecessary attention to Rule 9024 and could create a different standard of review under that rule than would apply in other instances. The Advisory Committee did not intend either consequence, so the subdivisions were deleted.

4. Subdivision (d)(1)(A) was restyled to form a vertical list of the motions subject to that provision.

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case — Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts

1 Except to the extent that relief is necessary to avoid
2 immediate and irreparable harm, the court shall not, within 20
3 days after the filing of the petition, grant relief regarding the
4 following:
5 (a) an application under Rule 2014;
6 (b) a motion to use, sell, lease, or otherwise incur an
7 obligation regarding property of the estate, including a motion
8 to pay all or part of a claim that arose before the filing of the
9 petition, but not a motion under Rule 4001; and
10 (c) a motion to assume or assign an executory contract or
11 unexpired lease in accordance with § 365.

COMMITTEE NOTE

There can be a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior to the

formation of a creditors' committee, and it also can include substantial amounts of materials for the court and parties in interest to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

The rule provides that the court cannot grant relief on applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate other than such a motion under Rule 4001, and motions to assume or assign executory contracts and unexpired leases for the first 20 days of the case, unless granting relief is necessary to avoid immediate and irreparable harm. This standard is taken from Rule 4001(b)(2) and (c)(2), and decisions under those provisions should provide guidance for the application of this provision.

This rule does not govern motions and applications made more than 20 days after the filing of the petition.

Public Comment on Proposed Amendments to Rule 6003:

1. Hon. Marvin Isgur, United States Bankruptcy Judge for the Southern District of Texas, in **Comment 05-BK-004** suggested that the rule should not restrict the ability of a debtor to reject an unexpired lease during the first 20 days of the case. He noted that rejection of leases should not be based on a showing of immediate and irreparable harm.

2. The National Bankruptcy Conference ("NBC") also objected to the proposal in its **Comment 05-BK-007**. The

basis of the objection was that the restriction on the ability to reject unexpired leases under the rule could lead to significant additional expense to the bankruptcy estate.

Changes After Publication:

Subdivision (c) was amended by deleting the reference to the rejection of executory contracts or unexpired leases. The rule, as revised, now limits only the assumption or assignment of executory contracts or unexpired leases in that subdivision.

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease

1 * * * * *

2 (e) LIMITATIONS. The trustee shall not seek authority
3 to assume or assign multiple executory contracts or unexpired
4 leases in one motion unless: (1) all executory contracts or
5 unexpired leases to be assumed or assigned are between the
6 same parties or are to be assigned to the same assignee; (2)
7 the trustee seeks to assume, but not assign to more than one
8 assignee, unexpired leases of real property; or (3) the court

9 otherwise authorizes the motion to be filed. Subject to
10 subdivision (f), the trustee may join requests for authority to
11 reject multiple executory contracts or unexpired leases in one
12 motion.
13 (f) OMNIBUS MOTIONS. A motion to reject or, if
14 permitted under subdivision (e), a motion to assume or assign
15 multiple executory contracts or unexpired leases that are not
16 between the same parties shall:
17 (1) state in a conspicuous place that parties receiving
18 the omnibus motion should locate their names and their
19 contracts or leases listed in the motion;
20 (2) list parties alphabetically and identify the
21 corresponding contract or lease;
22 (3) specify the terms, including the curing of defaults,
23 for each requested assumption or assignment;

24 (4) specify the terms, including the identity of each
25 assignee and the adequate assurance of future performance by
26 each assignee, for each requested assignment;
27 (5) be numbered consecutively with other omnibus
28 motions to assume, assign, or reject executory contracts or
29 unexpired leases; and
30 (6) be limited to no more than 100 executory
31 contracts or unexpired leases.
32 (g) FINALITY OF DETERMINATION. The finality of
33 any order respecting an executory contract or unexpired lease
34 included in an omnibus motion shall be determined as though
35 such contract or lease had been the subject of a separate
motion.

COMMITTEE NOTE

The rule is amended to authorize the use of omnibus motions to reject multiple executory contracts and unexpired leases. In some cases there may be numerous executory contracts and unexpired

leases, and this rule permits the combining of up to one hundred of these contracts and leases in a single motion to initiate the contested matter.

The rule also is amended to authorize the use of a single motion to assume or assign executory contracts and unexpired leases (i) when such contracts and leases are with a single nondebtor party, (ii) when such contracts and leases are being assigned to the same assignee, (iii) when the trustee proposes to assume, but not assign to more than one assignee, real property leases, or (iv) the court authorizes the filing of a joint motion to assume or to assume and assign executory contracts and unexpired leases under other circumstances that are not specifically recognized in the rule.

An omnibus motion to assume, assign, or reject multiple executory contracts and unexpired leases must comply with the procedural requirements set forth in subdivision (f) of the rule, unless the court orders otherwise. These requirements are intended to ensure that the nondebtor parties to the contracts and leases receive effective notice of the motion. Among those requirements is the requirement in subdivision (f)(5) that these motions be consecutively numbered (*e.g.*, Debtor in Possession's First Omnibus Motion for Authority to Assume Executory Contracts and Unexpired Leases, Debtor in Possession's Second Omnibus Motion for Authority to Assume Executory Contracts and Unexpired Leases, etc.). There may be a need for several of these motions in a particular case. Numbering the motions consecutively is essential to keep track of these motions on the court's docket and should avoid confusion that might otherwise result from similar or identically-titled motions.

Subdivision (g) of the rule provides that the finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other contracts or leases included in the omnibus motion to obtain appellate review of the order. The rule permits the listing of multiple contracts or leases for convenience, and that convenience should not impede timely review of the court's decision with respect to each contract or lease.

Comments on Proposed Rule 6006:

1. Mr. Anthony Sabino of the New York bar, **Comment 05-BK-005**, generally supported the proposed changes to the rule but urges that the rule be amended to state explicitly that the interests of justice should control as to the propriety of employing omnibus motions.

2. The National Bankruptcy Conference ("NBC") in **Comment 05-BK-007** generally supported the proposed amendments to the rule. The NBC suggested, however, that the rule be further amended in subdivision (e) to permit the trustee to assume, but not assign, multiple unexpired leases of real property without regard to the identity of the nondebtor party to the lease. It argued that this is appropriate because the assumptions all require the same basic proof of the debtor's ability to perform the terms of the leases in the future.

Changes After Publication:

Subdivision (e) of the proposed rule was amended as suggested by the NBC to insert a third category of requests that the trustee may make under an omnibus motion. The list of categories was numbered, and the new category is set out in (e)(2).

Rule 7007.1. Corporate Ownership Statement

1 * * * * *

2 (b) TIME FOR FILING. A party shall file the statement
3 required under Rule 7007.1(a) with its first ~~pleading in an~~
4 ~~adversary proceeding~~ appearance, pleading, motion, response,
5 or other request addressed to the court. A party shall file a
6 supplemental statement promptly upon any change in
7 circumstances that this rule requires the party to identify or
8 disclose.

COMMITTEE NOTE

The rule is amended to clarify that a party must file a corporate ownership statement with its initial paper filed with the court in an adversary proceeding. The party's initial filing may be a document that is not a "pleading" as defined in Rule 7 F. R. Civ. P.,

which is made applicable in adversary proceedings by Rule 7007. The amendment also brings Rule 7007.1 more closely in line with Rule 7.1 F. R. Civ. P.

Comments on Proposed Rule 7007.1:

No comments were received on this rule.

Changes After Publication:

No changes were made after publication.

Rule 9005.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

1 Rule 5.1 F. R. Civ. P. applies in cases under the Code.

COMMITTEE NOTE

The rule is added to adopt the new rule added to the Federal Rules of Civil Procedure. The new Civil Rule replaces Rule 24(c) F. R. Civ. P., so the cross reference to Civil Rule 24 contained in Rule 7024 is no longer sufficient to bring the provisions of new Civil Rule 5.1 into adversary proceedings. This rule also makes Civil Rule 5.1 applicable to all contested matters and other proceedings within the bankruptcy case.

Comments on Proposed Rule 9005.1:

No comments were received on this rule.

Changes After Publication:

No changes were made after publication.

Rule 9037. Privacy Protection For Filings Made with the Court

1 (a) REDACTED FILINGS. Unless the court orders
2 otherwise, in an electronic or paper filing made with the court
3 that contains an individual's social-security number, taxpayer-
4 identification number, or birth date, the name of an
5 individual, other than the debtor, known to be and identified
6 as a minor, or a financial-account number, a party or nonparty
7 making the filing may include only:
8 (1) the last four digits of a social-security number
9 and an individual's taxpayer-identification number;
10 (2) the year of the individual's birth;
11 (3) the minor's initials; and

12 (4) the last four digits of the financial-account
13 number.
14 (b) EXEMPTIONS FROM THE REDACTION
15 REQUIREMENT. The redaction requirement does not apply
16 to the following:
17 (1) a financial-account number that identifies
18 property allegedly subject to forfeiture in a forfeiture
19 proceeding;
20 (2) the record of an administrative or agency
21 proceeding unless filed with a proof of claim;
22 (3) the official record of a state-court proceeding;
23 (4) the record of a court or tribunal, if that record
24 was not subject to the redaction requirement when originally
25 filed;
26 (5) a filing covered by subdivision (c) of this rule;
27 and

28 (6) a filing that is subject to § 110 of the Code.

29 (c) FILINGS MADE UNDER SEAL. The court may
30 order that a filing be made under seal without redaction. The
31 court may later unseal the filing or order the person who made
32 the filing to file a redacted version for the public record.

33 (d) PROTECTIVE ORDERS. For cause, the court may
34 by order in a case under the Code:

35 (1) require redaction of additional information; or

36 (2) limit or prohibit a nonparty's remote electronic
37 access to a document filed with the court.

38 (e) OPTION FOR ADDITIONAL UNREDACTED
39 FILING UNDER SEAL. An entity making a redacted filing
40 may also file an unredacted copy under seal. The court must
41 retain the unredacted copy as part of the record.

42 (f) OPTION FOR FILING A REFERENCE LIST. A
43 filing that contains redacted information may be filed together

44 with a reference list that identifies each item of redacted
45 information and specifies an appropriate identifier that
46 uniquely corresponds to each item listed. The list must be
47 filed under seal and may be amended as of right. Any
48 reference in the case to a listed identifier will be construed to
49 refer to the corresponding item of information.
50 (g) WAIVER OF PROTECTION OF IDENTIFIERS. An
51 entity waives the protection of subdivision (a) as to the
52 entity's own information by filing it without redaction and not
53 under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form, but the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into

the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social-security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (c) or (d). Moreover, the rule does not affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority.

Any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should therefore notify clients of this fact so that an informed decision may

be made on what information is to be included in a document filed with the court.

A debtor's full social-security number is included on the notice of the § 341 meeting of creditors sent to creditors. Of course, that is not filed with the court, *see* Rule 1007(f) (the debtor "submits" this information), and the copy of the notice that is filed with the court does not include the full social-security number. Thus, since the full social-security number is not filed with the court, it is not available to a person searching that record.

The clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court.

Subdivision (d) recognizes the court's inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the rule. These orders may be issued whenever necessary either by the court on its own motion, or on motion of a party in interest.

Subdivision (e) allows an entity that makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (f) allows parties to file a reference list of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (g) allows an entity to waive the protections of the rule as to that entity's own personal information by filing it in unredacted form. An entity may elect to waive the protection if, for example, it determines that the costs of redaction outweigh the benefits to privacy. As to financial-account numbers, the instructions to Schedules E and F of Official Form 6 note that the debtor may elect to include the complete account number on those schedules rather than limit the number to the final four digits. Including the complete number would operate as a waiver by the debtor under subdivision (g) as to the full information that the debtor set out on those schedules. The waiver operates only to the extent of the information that the entity filed without redaction. If an entity files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 9037 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with this rule if and when they are filed as part of an appeal or for other reasons.

Comments on Proposed Rule 9037:

1. **Comment 05-BK-001** was submitted by Ms. Marjorie K. Lynch, Bankruptcy Administrator for the Eastern District of North Carolina. She objects to the restrictions on access to

the redacted information in documents filed with the court. She suggests that the rule be revised to provide specifically that the Bankruptcy Administrator and United States trustee have access to the redacted information. It appears that her comments are addressed only to materials that are "submitted" to the court as compared to documents "filed" with the court. This is presumably the debtor's statement of social-security number submitted under Rule 1007(f) an provided on Official Form 21. Since this is a matter that is not really addressed in the new rule 9037, the comment is more properly addressed to the other rule and form.

2. **Comment 05-BK-006**, submitted by the Judicial Conference Committee on Court Administration and Case Management (CACM), generally supports the proposed rule. CACM offered one suggestion regarding subdivision (b)(2) of the proposed rule. CACM proposed that subdivision (b)(2) be revised to refer to the record of a court that later becomes part of the record in the pending bankruptcy case or proceeding rather than refer to the record of a court whose decision is being reviewed.

3. **Comment 05-BK-008** was submitted by Mr. Peter Winn, an Assistant United States Attorney and an Adjunct Professor at the University of Washington School of Law. Mr. Winn's comment includes an extensive description of the PACER process and recognizes the Committees' efforts to strike the appropriate balance between privacy and the public's right to know about matters pending in or resolved by the courts. He generally commends the Committees for the solution proposed in Rule 9037 and its counterparts. He does suggest

one amendment to subdivision (c)(2) of Civil Rule 5.2, but that subdivision has no counterpart in Bankruptcy Rule 9037.

4. **Comment 05-BK-009** was submitted by the National Court Reporters Association, and it generally supports the proposed rule. The only suggested change would be to move into the text of the Rule the statement contained in the Committee Note that counsel and the parties are responsible to redact the appropriate information and the clerk has no obligation to review or edit filings.

5. **Comment 05-BK-010** was submitted by the Public Citizen Litigation Group (PCLG). This lengthy comment asserts that the proposed rules go too far in protecting social-security and immigration cases from public access. These provisions are contained only in the Civil Rule version of the E-Government Act rules, so the PCLG comments on that issue are not germane to Rule 9037. PCLG, however, also suggests that Rule 9037(d) should not allow courts to issue protective orders for "sensitive" information. It believes that the subdivision should permit protective orders only for privacy protection and that allowing protective orders for "sensitive" information establishes too low a bar for the issuance of these orders. PCLG also proposes that the rule be amended to provide in subdivision (d) that protective orders be issued "If necessary to protect private information that is not otherwise protected under subdivision (a), and only where the interest in privacy outweighs the public interest in openness." The stated purpose of the recommendation, in addition to deleting "sensitiveness" as a basis for a protective

order, is to provide a standard for the courts to apply in these cases.

6. **Comment 05-BK-012** was submitted by the Electronic Privacy Information Group (EPIG). EPIG's suggestions were more general than many others offered by interested groups. For example, it suggested that the rules be amended to minimize the use of otherwise private information. It also opposed in general subdivision (c)(2) of the Civil Rule that would treat remote and courthouse access to files differently. Again, this is not a part of Rule 9037, so it is not germane to the Bankruptcy Rules amendments. EPIG suggested that the rules be refined to establish limits on the use of information contained in the court files. For example, it suggests that the rules could provide that the information could be used only for law enforcement, research, or journalistic purposes. EPIG also suggests prohibiting the publication of any part of a social-security number as well as other informational items like a person's home address, telephone number, and mother's maiden name.

7. **Comment 05-BK-013** was submitted by The Reporters Committee for Freedom of the Press. To the extent that its submission addressed the limits on access to social-security and immigration case files, the comment applies only to Civil Rule 5.2. The Reporters Committee also asserts that all of the relevant rules, however, should not require the redaction of a person's year of birth or the name of a minor child. They suggest that these are informational items that are necessary for a reporter to correctly identify the subject of a story. Rule 9037 requires the debtor's full name if the debtor is a minor,

and only requires redaction of the minor's name if he or she is being identified as a minor.

Changes After Publication:

Rule 9037 is intended to parallel as closely as possible Civil Rule 5.2 and Criminal Rule 49.1. The Advisory Committees have worked together to maintain as much consistency as possible in the three versions of the rule. The rule has been revised to implement the several style revisions suggested by the Style Subcommittee of the Standing Committee. Subdivision (b)(2) was amended in response to the suggestion of the Committee on Court Administration and Case Management so that it now refers to court records that become a part of the record in the pending matter.

11-B

ACTION ITEM

B. Proposed Amendments to Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009. Proposed new Bankruptcy Rules: 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011.:

The Advisory Committee recommends that the Standing Committee approve the following proposed amendments to the Bankruptcy Rules and Official Forms for publication for comment.

1. Synopsis of Proposed New Rules and Amendments to Bankruptcy Rules.

(a) **Rule 1005 (conforming)** contains an amendment to require the disclosure of all names used by the debtor in the past eight years to implement the provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 2005 Act) that extends the time between discharges from six to eight years. The rule is also amended to include an individual debtor's taxpayer-identification number among the information that must be limited to protect the debtor's privacy.

(b) **Rule 1006 (conforming)** is amended to implement the provisions in the 2005 Act that, for the first time on a nationwide basis, authorize the courts to waive the payment of filing fees by debtors. The amendment directs the debtor to use the Official Form for requesting a fee waiver. The amendment also permits the court to allow the payment of the filing fee in installments even if the debtor has made a payment to an attorney in connection with the case.

(c) **Rule 1007 (conforming)** is amended to reflect the expanded obligations of debtors to file a variety of documents and materials by the 2005 Act. The amendments address the filing of current monthly income statements and other forms to implement the means test imposed by the 2005 Act. There are also changes to require debtors to file additional materials such as payment advices and education income retirement accounts, as well as certificates for the completion of credit counseling and financial

management programs mandated by the legislation. The rule is also amended to recognize the limitation on the extension of the time to file schedules and statements when the debtor is a small business debtor. Section 1116(3), added to the Bankruptcy Code by the 2005 Act, establishes a specific standard for the courts to apply in the event that the debtor in possession or the trustee seeks an extension for the filing of these forms for a period beyond 30 days after the order for relief. Finally, the rule is amended to require that any entity filing a petition for recognition to commence a case under chapter 15 of the Code file a list of entities with whom the debtor is engaged in litigation in the United States. This chapter was added to the Code by the 2005 Act. The recognition of a foreign proceeding makes § 362 of the Code operative in the case, so the amendment to the rule requires the entity filing a petition for recognition to file a list of parties to pending litigation with the debtor. These entities can then be notified prior to the imposition of the automatic stay that the petitioner has sought relief under chapter 15.

(d) **Rule 1009 (technical)** is amended to correct a cross reference to the Bankruptcy Code due to the restructuring of § 521 of the Code by the 2005 Act.

(e) **Rule 1010 (conforming)** is amended to implement the changes to the Bankruptcy Code made by the 2005 Act. It repealed § 304 of the Code and replaced it with chapter 15 governing both ancillary

and cross-border cases. Under that chapter, a foreign representative commences a case by filing a petition for recognition of a pending foreign proceeding. This amendment requires service of the summons and petition on the debtor and any entity against whom the representative is seeking provisional relief. The rule also provides that the court may direct that service be made on additional entities as appropriate.

(f) **Rule 1011 (technical)** is amended to reflect the enactment of the 2005 Act which repealed § 304 of the Code and added chapter 15 to the Code. Section 304 covered cases "ancillary to foreign proceedings," while chapter 15 of the Code governs cross-border insolvencies and introduces the concept of a petition for recognition of a foreign proceeding. The amendment implements this new terminology.

(g) **Rule 1015 (technical)** is amended to change the cross references in the rule to conform to the renumbered subsections of the provision of the Bankruptcy Code as amended by the 2005 Act.

(h) **Rule 1017 (conforming)** is amended to implement the amendments to § 707(b) of the Code by the 2005 Act that permit parties in interest to move to dismiss the chapter 7 case of an individual whose debts are primarily consumer debts as abusive. The amendments to subdivision (e) of the rule preserve the time limits already in place for § 707 motions. The rule also requires that a motion filed under § 707(b)(3)

state with particularity the circumstances that present the alleged abuse.

(I) **Rule 1019 (conforming)** is amended because the 2005 Act is likely to lead to more conversions of cases to and from chapters 7 and 13. The amendments preserve deadlines for motions to dismiss a case under § 707(b) upon conversion of a case from chapter 13 to chapter 7.

(j) **Rule 1020** is essentially a new rule that reflects the change in the definition of a small business debtor made by the 2005 Act. The former rule is deleted, and the new rule provides a procedure for informing the parties, the United States trustee, and the court of whether the debtor is a small business debtor. It also provides procedures for bringing to the court disputes regarding the proper characterization of the debtor. Because it is important to resolve such disputes early in the case, a time limit for objecting to the debtor's self-designation is imposed. Rule 9006(b)(1), which governs enlargement of time, is applicable to the time limits set forth in this rule. Subdivision (c), which relates the presence and activity of a committee of unsecured creditors, is designed to be consistent with the Code's definition of "small business debtor."

(k) **Rule 1021** is new. It is added to the rules to implement § 101(27A) of the Code, added by the 2005 Act. That section defines health care businesses, and the rule authorizes parties in interest to seek an

order identifying a debtor as a health care business. The debtor, in a voluntary case and the petitioning creditors in an involuntary case will make the health care business identification on the petition. If a party in interest disagrees with the determination by the debtor or petitioning creditors that the debtor is not a health care business, the party can move for an order designating the debtor as a health care business.

(*l*) **Rule 2002 (conforming and otherwise)** is amended to reflect the revisions to § 704 of the Bankruptcy Code in the 2005 Act requiring the court to provide a copy to all creditors of a statement by the United States trustee as to whether the debtor's case would be presumed to be an abuse under § 707(b) not later than five days after receiving it.

The rule is also amended in several respects to implement amendments made to the business provisions of the Code by the 2005 Act. Subdivision (b) is amended to require that notice of a hearing on the approval of a plan to serve as a disclosure statement be given in a small business case in chapter 11. Subdivision (p)(1) is added to the rule to give the court flexibility to direct that notice by other means shall supplement notice by mail, or to enlarge the notice period, for creditors with foreign addresses now required by § 1514(d) of the Code. This portion of the rule recognizes that the court has discretion to establish procedures to determine, on its own initiative, whether relief under subdivision (p) is

appropriate, but that the court is not required to establish such procedures and may decide to act only on request of a party in interest. Subdivision (p)(2) is added to the rule to grant creditors with a foreign address to which notices are mailed at least 30 days notice of the time within which to file proofs of claims if notice is mailed to the foreign address, unless the court orders otherwise. If cause exists, such as likely delays in the delivery of notices in particular locations, the court may extend the notice period for creditors with foreign addresses. The court also may shorten the additional notice time if circumstances so warrant.

Finally, Rule 2002 is amended to implement the provisions of chapter 15 of the Bankruptcy Code. Subdivision (q) is added to the rule to require that notice be given to the debtor and entities against whom provisional relief is sought of a hearing on a petition for recognition of a foreign proceeding. There is no need at this stage of the proceedings to provide notice to all creditors. If the foreign representative should take action to commence a case under another chapter of the Code, the rules governing those proceedings will operate to provide that notice is given to all creditors.

(m) **Rule 2003 (technical)** is amended to implement the 2005 Act's amendment to § 341(e) of the Code. The amendment to the rule authorizes the court, on request of a party in interest and after notice and a

hearing, to order that a meeting of creditors not be convened if the debtor had solicited acceptances of a plan prior to the commencement of the case. The amended rule recognizes that a meeting of creditors may not be held in those cases.

(n) **Rule 2007.1 (conforming)** is amended to reflect the change in the manner of the election and appointment of trustees in chapter 11 cases. The 2005 Act reduces somewhat the role of the United States trustee in the appointment process, so the amendments to Rule 2007.1 limit that role and require the elected trustee to file an affidavit setting forth information regarding that person's connections with creditors and others with an interest in the case.

(o) **Rule 2007.2 (conforming)** is new. It is added to the rules to govern the appointment of a health care ombudsman in the first 30 days of all health care business cases unless the court finds that the appointment is not necessary for the protection of patients. This is a new obligation created by § 333 of the Code added by the 2005 Act. The rule recognizes this obligation and provides that any party in interest that believes that the appointment of a health care ombudsman is unnecessary in the case must file its objection to the appointment within the first twenty days of the case. That entity also must notify other interested parties that the objection has been filed. The court will then consider the objection and determine whether to order the United States trustee

to make the appointment. In the absence of any timely objections, the court will enter an order directing the United States trustee to appoint the ombudsman. The rule also permits parties in interest to file motions either to appoint or terminate the appointment of these ombudsmen, and it sets forth the procedure for approving the appointment.

(p) **Rule 2015 (conforming)** is amended by inserting a new subdivision (d) to implement § 1518 added to the Code by the 2005 Act. That section directs the foreign representative to make reports to the court, and the rule sets the time for the filing of those reports. Former subdivision (d) is renumbered as subdivision (e).

(q) **Rule 2015.1** is new. It is added to implement § 333(b) and (c) added to the Code by the 2005 Act. The rule requires ten days notice of reports to be made by the health care ombudsman and sets out the entities to whom the notice must be given. The rule permits the notice to relate to a single report or to periodic reports to be given throughout the course of the case. That is, the notice may serve as notice of all reports to be given by the ombudsman at specified intervals during the case. Interested parties will then be able to review the written reports or attend the hearings at which oral reports might be given. The rule also implements § 333(c)(1) added to the Code by the 2005 Act. The statute requires court approval of the ombudsman's review of the patient records with the

imposition of appropriate restrictions to protect the confidentiality of the records. The rule requires the ombudsman to notify the United States trustee, the patient, and any family member or contact person whose name and address have been given to the trustee or the debtor that the ombudsman is seeking access to otherwise confidential patient records. This provides an opportunity for the patient and United States trustee to appear and be heard on the matter and should assist the court in reaching its decision both as to access to the records and appropriate restrictions on that access to ensure continued confidentiality. A notice given under the rule is expressly made subject to applicable nonbankruptcy laws governing patient privacy.

(r) **Rule 2015.2 (conforming)** is new. It is added to implement § 704(a)(12) which was added to the Code by the 2005 Act. That section authorizes the trustee to relocate patients when a health care business debtor's facility is being closed. The statute permits the trustee to take this action without the need for any order from the court, but the notice required by this rule will enable patients who contend that the trustee's actions violate § 704(a)(12) to have those issues resolved. A notice given under the rule is expressly made subject to applicable nonbankruptcy laws governing patient privacy.

(s) **Rule 2015.3** is new. It implements § 419 of the 2005 Act by requiring the filing of periodic reports of

the value and profitability of any entity in which the debtor has a substantial or controlling interest. Reports are to be made on the appropriate Official Form. While § 419 of the 2005 Act places the obligation to report upon the "debtor," the rule extends the obligation to include cases in which a trustee has been appointed. The rule also establishes procedures for the determination of the applicability of the rule to specific debtors. Under the rule, the court can order that the reports not be filed in appropriate circumstances, such as when the information that would be included in these reports is already available to interested parties.

(t) **Rule 3002 (conforming and otherwise)** is amended to conform to changes in the Code made by the 2005 Act. Under § 502(b)(9), governmental units asserting claims based on tax returns filed under § 1308 during a chapter 13 case have a different time period for filing proofs of those claims. Paragraph (c)(1) is amended to conform to §502(b)(9).

The rule is also amended to implement § 1514(d) which was added to the Bankruptcy Code by the 2005 Act. Subdivision (c)(6) gives the court discretion to extend the time for filing a proof of claim for a creditor who received notice of the time to file the claim at a foreign address, if the court finds that the notice was not sufficient, under the particular circumstances, to give the foreign creditor a reasonable time to file a proof of claim.

(u) **Rule 3003 (technical)** is amended to implement § 1514(d), which was added to the Code by the 2005 Act, by making the new Rule 3002(c)(6) applicable in chapter 9 and chapter 11 cases.

(v) **Rule 3016 (conforming)** is amended to recognize that the 2005 Act added §1125(f)(1) to the Code to provide that the plan proponent in a small business case need not file a disclosure statement if the plan itself includes adequate information and the court finds that a separate disclosure statement is unnecessary. If the plan is intended to provide adequate information in a small business case, it may be conditionally approved as a disclosure statement under Rule 3017.1 and is subject to all other rules applicable to disclosure statements in small business cases.

(w) **Rule 3017.1 (technical)** is amended to implement the 2005 Act's amendment to the Bankruptcy Code that permits the court in a small business chapter 11 case to conditionally approve a plan intended to provide adequate information. The plan is then treated as a disclosure statement under this rule.

(x) **Rule 3019 (conforming)** is amended because the 2005 Act added to the Bankruptcy Code a provision for the modification of plans filed by individual debtors in chapter 11 cases. The rule is amended to establish the procedure for filing and objecting to a proposed modification of a confirmed plan.

(y) **Rule 4002 (conforming)** is amended to implement the provisions of the 2005 Act that expand the obligation of debtors to provide additional evidence of personal identity, current income, and recent Federal income tax returns or tax transcripts. Amendments to the rule had been published for comment in August 2004, and this amendment carries forward from that proposed amendment the debtor's obligation to provide evidence of financial accounts existing at the time of the commencement of the case.

(z) **Rule 4003 (conforming)** is amended to reflect the 2005 Act's addition of § 522(q) to the Code. Section 522(q) imposes a $125,000 limit on a state homestead exemption if the debtor has been convicted of a felony or owes a debt arising from certain causes of action. Other revised provisions of the Code, such as § 727(a)(12) and § 1328(h), suggest that the court may consider issues relating to § 522 late in the case, and thus the 30-day period for objections would not be appropriate for this provision. Thus, a new subdivision (b)(2) is added to provide a separate time limit for this provision.

(aa) **Rule 4004 (conforming)** is amended to implement several provisions added to the Bankruptcy Code by the 2005 Act. The amendments address the postponement of the court's entry of a discharge pending the debtor's completion of a financial management program as well as the need to postpone the discharge to consider whether the debtor has

committed a felony or owes a debt arising from certain causes of action within a particular time frame.

(bb) **Rule 4006 (conforming)** is amended to reflect the 2005 Act's revision of the Bankruptcy Code that requires individual debtors to complete a course in personal financial management as a condition to the entry of a discharge. If the debtor fails to complete the course, no discharge will be entered, but the case may be closed. The amended rule provides notice to parties in interest, including the debtor, that no discharge was entered.

(cc) **Rule 4007 (conforming)** is amended because the 2005 Act expands the exceptions to discharge upon completion of a chapter 13 plan. Subdivision (c) extends to chapter 13 the same time limits applicable to other chapters of the Code with respect to the two exceptions to discharge that have been added to § 1328(a) and that are within § 523(c). Subdivision (d) is amended to establish a deadline for filing a complaint in a chapter 13 case only for § 523(a)(6), rather than for all of the categories of claims under § 523(c).

(dd) **Rule 4008 (conforming)** is amended to reflect the 2005 Act's addition of §§ 524(k)(6)(A) and 524(m) to the Bankruptcy Code. The provisions require that a debtor file a signed statement in support of a reaffirmation, and authorize a court to review the agreements if, based on the assertions on the

statement, the agreement is presumed to be an undue hardship. The rule revision requires that an accompanying statement show the total income and expense figures from schedules I and J and an explanation of any discrepancies. This will allow the court to evaluate the reaffirmation for undue hardship as § 524(m) requires.

(ee) **Rule 5001** is amended to permit bankruptcy judges to hold hearings outside of the district in which the case is pending to the extent that the circumstances lead to the authorization of the court to take such action under the 2005 amendment to 28 U.S.C. § 152(c).

(ff) **Rule 5003 (technical)** is amended to implement the addition of § 505(b) (1) to the Code by the 2005 Act. That section allows taxing authorities to designate addresses to use for the service of a request under that subsection.

(gg) **Rule 5008** is new. The 2005 Act revised § 342 of the Bankruptcy Code to require that clerks give written notice to all creditors not later than 10 days after the date of the filing of the petition that a presumption of abuse has arisen under § 707(b). A statement filed by the debtor will be the source of the clerk's information about the presumption of abuse. This rule enables the clerk to meet its obligation to send the notice within the statutory time period set forth in § 342. In the event that the court receives the

debtor's statement after the clerk has sent the first notice, and the debtor's statement indicates a presumption of abuse, this rule requires that the clerk send a second notice.

(hh) **Rule 5012 (conforming)** is new. It is added to implement § 1525 of the Code which was added by the 2005 Act. The rule provides an opportunity for parties in the case to take appropriate action prior to the communication between courts to establish procedures for the manner of the communication and the right to participate in the communication.

(ii) **Rule 6004 (conforming)** is amended to implement sections 332 and 363(b)(1)(B) of the Code, added by the 2005 Act. Those sections require the appointment of a consumer privacy ombudsman in certain circumstances when a debtor proposes to sell personally identifiable information.

(jj) **Rule 6011** is new. It is added to implement § 351(1) which was added to the Code by the 2005 Act. That provision requires the trustee to notify patients that their patient records will be destroyed if they remain unclaimed for one year after the publication of a notice in an appropriate newspaper. The statute also requires that individualized notice be sent to each patient and every family member and other contact person to whom the debtor is providing information about the patient's health. Subdivisions (a) and (b) establish minimum requirements for

notices to patients, their family members, and contact persons to ensure that sufficient information is provided to these persons regarding the trustee's intent to dispose of patient records. Subdivision (c) directs the trustee to maintain proof of compliance with § 351(1)(B), but it prohibits filing the proof of compliance unless the court orders the trustee to file it under seal because the proof of compliance may contain patient names that should or must remain confidential. Subdivision (d) requires the trustee to file a report with the court regarding the destruction of patient records. This certification is intended to ensure that the trustee properly completed the destruction process. Again, notices under this rule are expressly made subject to applicable nonbankruptcy laws governing patient privacy.

(kk) **Rule 8001(conforming)** is amended to implement the direct appeal provisions in the 2005 Act. The 2005 Act amended 28 U.S.C. § 158 to authorize appeals directly to the courts of appeals upon certification either by the bankruptcy or district court or the bankruptcy appellate panel. Certification is also available to the parties either on request to the court, or if all of the parties agree. The rule also provides that review by the court of appeals, which is at its discretion, requires that a party file a timely notice of appeal.

(*ll*) **Rule 8003 (conforming)** is amended to implement the direct appeal provisions included in the

2005 Act. It provides that a certification by the lower court or the allowance of leave to appeal by the court of appeals is deemed to satisfy the requirement for leave to appeal even if no motion for leave to appeal has been filed.

(mm) **Rule 9006 (technical)** is amended to recognize that extensions of time for filing schedules and a statement of financial affairs by small business debtors cannot be extended beyond the time set in § 1116(3) of the Code, which was added by the 2005 Act. This amendment operates in tandem with the amendment to Rule 1007(c) to recognize this restriction on expanding the time to file these documents in small business cases.

(nn) **Rule 9009 (technical)** is amended to provide that a plan proponent in a small business chapter 11 case need not use an Official Form of a plan of reorganization and disclosure statement. Absent the amendment, the Official Form would have to be used, and the 2005 Act anticipates the use of both an Official Form and a form that is adopted by local courts.

Rule 1005. Caption of Petition

1 The caption of a petition commencing a case under the
2 Code shall contain the name of the court, the title of the case,
3 and the docket number. The title of the case shall include the
4 following information about the debtor: name, employer
5 identification number, last four digits of the social-security
6 number or individual debtor's taxpayer-identification number,
7 any other federal ~~tax~~ taxpayer-identification number, and all
8 names used within ~~six~~ eight years before filing the petition.
9 If the petition is not filed by the debtor, it shall include all
10 names used by the debtor which are known to the petitioners.

COMMITTEE NOTE

The rule is amended to require the disclosure of all names used by the debtor in the past eight years. Section 727(a)(8) was amended in 2005 to extend the time between chapter 7 discharges from six to eight years, and the rule is amended to implement that

change. The rule also is amended to require the disclosure of the last four digits of an individual debtor's taxpayer-identification number. This truncation of the number applies only to individual debtors. This is consistent with the requirements of Rule 9037.

INTERIM RULES COMPARISON:

This Rule was not included in the Interim Rules.

Rule 1006. Filing Fee

1 (a) GENERAL REQUIREMENT. Every petition shall be
2 accompanied by the filing fee except as provided in
3 subdivisions (b) and (c) of this rule. For the purpose of this
4 rule, "filing fee" means the filing fee prescribed by 28 U.S.C.
5 § 1930(a)(1)-(a)(5) and any other fee prescribed by the
6 Judicial Conference of the United States under 28 U.S.C.
7 § 1930(b) that is payable to the clerk upon the commencement
8 of a case under the Code.
9 (b) PAYMENT OF FILING FEE IN INSTALLMENTS.

10 (1) *Application ~~for Permission~~ to Pay Filing Fee in*
11 *Installments.* A voluntary petition by an individual shall be
12 accepted for filing if accompanied by the debtor's signed
13 application, prepared as prescribed by the appropriate Official
14 Form, stating that the debtor is unable to pay the filing fee
15 except in installments. ~~The application shall state the~~
16 ~~proposed terms of the installment payments and that the~~
17 ~~applicant has neither paid any money nor transferred any~~
18 ~~property to an attorney for services in connection with the~~
19 ~~case.~~
20 * * * * *
21 (3) *Postponement of Attorney's Fees.* ~~The filing fee~~
22 All installments of the filing fee must be paid in full before
23 the debtor or chapter 13 trustee may make further payments
24 ~~pay an~~ to an attorney or any other person who renders services
25 to the debtor in connection with the case.

26 (c) WAIVER OF FILING FEE. A voluntary chapter 7
27 petition filed by an individual shall be accepted for filing if
28 accompanied by the debtor's application requesting a waiver
29 under 28 U.S.C. § 1930(f), prepared as prescribed by the
30 appropriate Official Form.

COMMITTEE NOTE

Subdivision (a) is amended to include a reference to new subdivision (c), which deals with fee waivers under 28 U.S.C. § 1930(f), which was added in 2005.

Subdivision (b)(1) is amended to delete the sentence requiring a disclosure that the debtor has not paid an attorney or other person in connection with the case. Inability to pay the filing fee in installments is one of the requirements for a fee waiver under the 2005 revisions to 28 U.S.C. § 1930(f). If the attorney payment prohibition were retained, payment of an attorney's fee would render many debtors ineligible for installment payments and thus enhance their eligibility for the fee waiver. The deletion of this prohibition from the rule, which was not statutorily required, ensures that debtors who have the financial ability to pay the fee in installments will do so rather than request a waiver.

Subdivision (b)(3) is amended in conformance with the changes to subdivision (b)(1) to reflect the 2005 amendments. The change is meant to clarify that subdivision (b)(3) refers to payments

made after the debtor has filed the bankruptcy case and after the debtor has received permission to pay the fee in installments. Otherwise, the subdivision may conflict with the intent and effect of the amendments to subdivision (b)(1).

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 1007. Lists, Schedules, ~~and~~ Statements, and Other Documents; Time Limits

1 (a) CORPORATE OWNERSHIP STATEMENT, LIST
2 OF CREDITORS AND EQUITY SECURITY HOLDERS,
3 AND ~~CORPORATE OWNERSHIP STATEMENT~~ OTHER
4 LISTS.
5 * * * * *
6 (4) *Chapter 15 Case.* Unless the court orders
7 otherwise, a foreign representative filing a petition for
8 recognition under chapter 15 shall file with the petition a list
9 containing the name and address of all administrators in
10 foreign proceedings of the debtor, all parties to litigation

11 pending in the United States in which the debtor is a party at
12 the time of the filing of the petition, and all entities against
13 whom provisional relief is being sought under § 1519 of the
14 Code.

15 ~~(4)~~ (5) *Extension of Time.* Any extension of time for
16 the filing of lists required by this subdivision may be granted
17 only on motion for cause shown and on notice to the United
18 States trustee and to any trustee, committee elected ~~pursuant~~
19 ~~to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the
20 Code, or other party as the court may direct.

21 (b) SCHEDULES, ~~AND~~ STATEMENTS, AND OTHER
22 DOCUMENTS REQUIRED.

23 (1) Except in a chapter 9 municipality case, the
24 debtor, unless the court orders otherwise, shall file the
25 following schedules, statements, and other documents,

26 prepared as prescribed by the appropriate Official Forms, if
27 any:
28 (A) schedules of assets and liabilities~~,~~ ;
29 (B) a schedule of current income and
30 expenditures~~,~~;
31 (C) a schedule of executory contracts and
32 unexpired leases~~, and~~ ;
33 (D) a statement of financial affairs ~~, prepared as~~
34 ~~prescribed by the appropriate Official Forms~~ ;
35 (E) copies of all payment advices or other
36 evidence of payment, if any, received by the debtor from an
37 employer within 60 days before the filing of the petition, with
38 redaction of all but the last four digits of the debtor's social-
39 security number or individual taxpayer-identification number;
40 and

41 (F) a record of any interest that the debtor has in
42 an account or program of the type specified in § 521(c) of the
43 Code.

44 (2) An individual debtor in a chapter 7 case shall file
45 a statement of intention as required by § 521(a) ~~521(2)~~ of the
46 Code, prepared as prescribed by the appropriate Official
47 Form. A copy of the statement of intention shall be served on
48 the trustee and the creditors named in the statement on or
49 before the filing of the statement.

50 (3) Unless the United States trustee has determined
51 that the credit counseling requirement of § 109(h) does not
52 apply in the district, an individual debtor must file a statement
53 of compliance with the credit counseling requirement,
54 prepared as prescribed by the appropriate Official Form which
55 must include one of the following:

56 (A) an attached certificate and debt repayment
57 plan, if any, required by § 521(b);
58 (B) a statement that the debtor has received the
59 credit counseling briefing required by § 109(h)(1) but does
60 not have the certificate required by § 521(b);
61 (C) a certification under § 109(h)(3); or
62 (D) a request for a determination by the court
63 under § 109(h)(4).
64 (4) Unless § 707(b)(2)(D) applies, an individual
65 debtor in a chapter 7 case with primarily consumer debts shall
66 file a statement of current monthly income prepared as
67 prescribed by the appropriate Official Form, and, if the
68 current monthly income exceeds the median family income
69 for the applicable state and household size, the information,
70 including calculations, required by § 707(b), prepared as
71 prescribed by the appropriate Official Form.

72 (5) An individual debtor in a chapter 11 case shall file
73 a statement of current monthly income, prepared as prescribed
74 by the appropriate Official Form.
75 (6) A debtor in a chapter 13 case shall file a statement
76 of current monthly income, prepared as prescribed by the
77 appropriate Official Form, and, if the current monthly income
78 exceeds the median family income for the applicable state and
79 household size, a calculation of disposable income made in
80 accordance with § 1325(b)(3), prepared as prescribed by the
81 appropriate Official Form.
82 (7) An individual debtor in a chapter 7 or chapter 13
83 case shall file a statement of completion of a course
84 concerning personal financial management, prepared as
85 prescribed by the appropriate Official Form.
86 (8) If an individual debtor in a chapter 11, 12, or 13
87 case has claimed an exemption under § 522(b)(3)(A) in

88 property of the kind described in § 522(p)(1) with a value in
89 excess of the amount set out in § 522(q)(1), the debtor shall
90 file a statement as to whether there is any proceeding pending
91 in which the debtor may be found guilty of a felony of a kind
92 described in § 522(q)(1)(A) or found liable for a debt of the
93 kind described in § 522(q)(1)(B).

94 (c) TIME LIMITS. In a voluntary case, the schedules,
95 ~~and~~ statements, and other documents required by subdivision
96 (b)(1), (4), (5), and (6) ~~other than the statement of intention,~~
97 shall be filed with the petition; or within 15 days thereafter,
98 except as otherwise provided in subdivisions (d), (e), (f), and
99 (h) of this rule. In an involuntary case, the list in subdivision
100 (a)(2), and the schedules , ~~and~~ statements, and other
101 documents required by subdivision (b)(1) ~~other than the~~
102 ~~statement of intention,~~ shall be filed by the debtor within 15
103 days of the entry of the order for relief. In a voluntary case,

104 the documents required by paragraphs (A), (C), and (D) of
105 subdivision (b)(3) shall be filed with the petition. Unless the
106 court orders otherwise, a debtor who has filed a statement
107 under subdivision (b)(3)(B) shall file the documents required
108 by subdivision (b)(3)(A) within 15 days of the order for relief.
109 In a chapter 7 case, the debtor shall file the statement required
110 by subdivision (b)(7) within 45 days after the first date set for
111 the meeting of creditors under § 341 of the Code, and in a
112 chapter 13 case no later than the date when the last payment
113 was made by the debtor as required by the plan or the filing of
114 a motion for a discharge under § 1328(b). The debtor shall
115 file the statement required by subdivision (b)(8) no earlier
116 than the date of the last payment made under the plan or the
117 date of the filing of a motion for a discharge under
118 §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists,
119 schedules, ~~and~~ statements, and other documents filed prior to

120 the conversion of a case to another chapter shall be deemed
121 filed in the converted case unless the court directs otherwise.
122 Except as provided in § 1116(3), any ~~Any~~ extension of time
123 for the filing of the schedules, ~~and~~ statements, and other
124 documents required under this rule may be granted only on
125 motion for cause shown and on notice to the United States
126 trustee, ~~and to~~ any committee elected under § 705 or
127 appointed under § 1102 of the Code, trustee, examiner, or
128 other party as the court may direct. Notice of an extension
129 shall be given to the United States trustee and to any
130 committee, trustee, or other party as the court may direct.
131 * * * * *

COMMITTEE NOTE

The title of this rule is expanded to refer to "documents" in conformity with the 2005 amendments to § 521 and related provisions of the Bankruptcy Code that include a wider range of documentary requirements.

Subdivision (a) is amended to require that any foreign representative filing a petition for recognition to commence a case under chapter 15, which was added to the Code in 2005, file a list of entities with whom the debtor is engaged in litigation in the United States. The foreign representative filing the petition for recognition must also list any entities against whom provisional relief is being sought as well as all administrators in foreign proceedings of the debtor. This should ensure that entities most interested in the case, or their representatives, will receive notice of the petition under Rule 2002(q).

Subdivision (b)(1) addresses schedules, statements, and other documents that the debtor must file unless the court orders otherwise and other than in a case under chapter 9. This subdivision is amended to include documentary requirements added by the 2005 amendments to § 521 that apply to the same group of debtors and have the same time limits as the existing requirements of (b)(1). Consistent with the E-Government Act of 2002, Pub. L. No. 107-347, the payment advices should be redacted before they are filed.

Subdivision (b)(2) is amended to conform to the renumbering of the subsections of § 521.

Subdivisions (b)(3) through (b)(7) are new and implement the 2005 amendments to the Code. Subdivision (b)(3) provides for the filing of a document relating to the credit counseling requirement provided by the 2005 amendments to § 109 in the context of an Official Form that warns the debtor of the consequences of failing to comply with the credit counseling requirement.

Subdivision (b)(4) addresses the filing of information about current monthly income, as defined in § 101, for certain chapter 7 debtors and, if required, additional calculations of expenses required by the 2005 amendments to § 707(b).

Subdivision (b)(5) addresses the filing of information about current monthly income, as defined in § 101, for individual chapter 11 debtors. The 2005 amendments to § 1129(a)(15) condition plan confirmation for individual debtors on the commitment of disposable income, as defined in § 1325(b)(2), which is based on current monthly income.

Subdivision (b)(6) addresses the filing of information about current monthly income, as defined in § 101, for chapter 13 debtors and, if required, additional calculations of expenses. These changes are necessary because the 2005 amendments to § 1325 require that the determination of disposable income begin with current monthly income.

Subdivision (b)(7) reflects the 2005 amendments to §§ 727 and 1328 of the Code that condition the receipt of a discharge on the completion of a personal financial management course, with certain exceptions. To evidence compliance with that requirement, the subdivision requires the debtor to file the appropriate Official Form certifying that the debtor has completed the personal financial management course.

Subdivision (b)(8) is amended to require an individual debtor in a case under chapter 11, 12, and 13 to file a statement that there are no reasonable grounds to believe that the restrictions on a homestead exemption as set out in § 522(q) of the Code are applicable. Sections

1141(d)(5)(C), 1228(f), and 1328(h) each provide that the court shall not enter a discharge order unless it finds that there is no reasonable cause to believe that § 522(q) applies. Requiring the debtor to submit a statement to that effect in cases under chapters 11, 12, and 13 in which an exemption is claimed in excess of the amount allowed under § 522(q)(1) provides the court with a basis to conclude, in the absence of any contrary information, that § 522(q) does not apply. Creditors receive notice under Rule 2002(f)(11) of the time to request postponement of the entry of the discharge to permit an opportunity to challenge the debtor's assertions in the Rule 1007(b)(8) statement in appropriate cases.

Subdivision (c) is amended to include time limits for the filing requirements added to subdivision (b) due to the 2005 amendments to the Code, and to make conforming amendments. Separate time limits are provided for the documentation of credit counseling and for the statement of the completion of the financial management course. While most documents relating to credit counseling must be filed with the voluntary petition, the credit counseling certificate and debt repayment plan can be filed within 15 days of the filing of a voluntary petition if the debtor files a statement under subdivision (b)(3)(B) with the petition.

Subdivision (c) of the rule is also amended to recognize the limitation on the extension of time to file schedules and statements when the debtor is a small business debtor. Section 1116(3), added to the Code in 2005, establishes a specific standard for courts to apply in the event that the debtor in possession or the trustee seeks an extension for filing these forms for a period beyond 30 days after the order for relief.

INTERIM RULES COMPARISON:

Stylistic changes were made to subdivisions (a)(4), (b)(1)(E), and (b)(7). Subdivision (b)(3) was amended to require debtors to file a statement that sets out a list of possible circumstances relating to the requirement that debtors obtain credit counseling prior to the commencement of the case. Subdivision (c) is amended to permit the later filing of a certificate of credit counseling if the debtor has received the counseling prior to the filing of the petition but has not yet received the certificate of completion of the counseling.

Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements

1 * * * * *

2 (b) STATEMENT OF INTENTION. The statement of

3 intention may be amended by the debtor at any time before

4 the expiration of the period provided in § 521(a) ~~521(2)(B)~~ of

5 the Code. The debtor shall give notice of the amendment to

6 the trustee and to any entity affected thereby.

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to conform to the 2005 amendments to § 521 of the Code.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 1010. Service of Involuntary Petition and Summons; Petition ~~Commencing Ancillary Case~~ For Recognition of a Foreign Nonmain Proceeding

1 (a) SERVICE OF INVOLUNTARY PETITION AND
2 SUMMONS; SERVICE OF PETITION FOR
3 RECOGNITION OF FOREIGN NONMAIN PROCEEDING.
4 On the filing of an involuntary petition or a petition
5 ~~commencing a case ancillary to~~ for recognition of a foreign
6 nonmain proceeding, the clerk shall forthwith issue a
7 summons for service. When an involuntary petition is filed,
8 service shall be made on the debtor. When a petition
9 ~~commencing an ancillary case~~ for recognition of a foreign
10 nonmain proceeding is filed, service shall be made on the
11 ~~parties against whom relief is sought pursuant to § 304(b)~~
12 debtor, any entity against whom provisional relief is sought

13 under § 1519 of the Code, and on any other ~~parties~~ party as
14 the court may direct. The summons shall be served with a
15 copy of the petition in the manner provided for service of a
16 summons and complaint by Rule 7004(a) or (b). If service
17 cannot be so made, the court may order that the summons and
18 petition be served by mailing copies to the party's last known
19 address, and by at least one publication in a manner and form
20 directed by the court. The summons and petition may be
21 served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.
22 R. Civ. P. apply when service is made or attempted under this
23 rule.

24 (b) CORPORATE OWNERSHIP STATEMENT. Each
25 petitioner that is a corporation shall file with the involuntary
26 petition a corporate ownership statement containing the
27 information described in Rule 7007.1.

COMMITTEE NOTE

This rule is amended to implement the 2005 amendments to the Code, which repealed § 304 and replaced it with chapter 15 governing ancillary and other cross-border cases. Under chapter 15, a foreign representative commences a case by filing a petition for recognition of a pending foreign nonmain proceeding. The amendment requires service of the summons and petition on the debtor and any entity against whom the representative is seeking provisional relief. Until the court enters a recognition order under § 1517, no stay is in effect unless the court enters some form of provisional relief under § 1519. Thus, only those entities against whom specific provisional relief is sought need to be served. The court may, however, direct that service be made on additional entities as appropriate.

This rule does not apply to a petition for recognition of a foreign main proceeding.

The rule is also amended by renumbering the prior rule as subdivision (a) and adding a new subdivision (b) requiring any corporate creditor that files or joins an involuntary petition to file a corporate ownership statement.

INTERIM RULES COMPARISON:

The rule was amended by redesignating Interim Rule 1010 as Rule 1010(a). Subdivision (b) is new. It requires the filing of a corporate ownership statement with the filing of an involuntary petition. This change is not required by the 2005 Act.

Rule 1011. Responsive Pleading or Motion in Involuntary and ~~Ancillary~~ Cross-Border Cases

1 (a) WHO MAY CONTEST PETITION. The debtor
2 named in an involuntary petition, or a party in interest to a
3 petition ~~commencing a case ancillary to a~~ for recognition of
4 a foreign proceeding, may contest the petition. In the case of
5 a petition against a partnership under Rule 1004, a
6 nonpetitioning general partner, or a person who is alleged to
7 be a general partner but denies the allegation, may contest the
8 petition.

9 * * * * *

10 (f) CORPORATE OWNERSHIP STATEMENT. If the
11 entity responding to the involuntary petition or the petition for
12 recognition of a foreign proceeding is a corporation, the entity
13 shall file with its first appearance, pleading, motion, response,
14 or other request addressed to the court a corporate ownership

15 statement containing the information described in Rule

16 7007.1.

COMMITTEE NOTE

The rule is amended to reflect the 2005 amendments to the Code, which repealed § 304 and added chapter 15. Section 304 covered cases ancillary to foreign proceedings, while chapter 15 governs ancillary and other cross-border cases and introduces the concept of a petition for recognition of a foreign proceeding.

The rule is also amended in tandem with the amendment to Rule 1010 to require the parties responding to an involuntary petition and a petition for recognition of a foreign proceeding to file corporate ownership statements to assist the court in determining whether recusal is necessary.

INTERIM RULES COMPARISON:

Interim Rule 1011(a) was not changed. Subdivision (f) is new. It requires the filing of a corporate ownership statement with the first paper filed in response to an involuntary petition. This change is not required by the 2005 Act.

Rule 1015. Consolidation or Joint Administration of Cases Pending in Same Court

1 * * * * *

2 (b) CASES INVOLVING TWO OR MORE RELATED
3 DEBTORS. If a joint petition or two or more petitions are
4 pending in the same court by or against (1) a husband and
5 wife, or (2) a partnership and one or more of its general
6 partners, or (3) two or more general partners, or (4) a debtor
7 and an affiliate, the court may order the joint administration
8 of the estates. Prior to entering an order the court shall give
9 consideration to protecting creditors of different estates
10 against potential conflicts of interest. An order directing joint
11 administration of individual cases of a husband and wife
12 shall, if one spouse has elected the exemptions under § 522(b)
13 ~~(1)~~ (2) of the Code and the other has elected the exemptions
14 under § 522 (b)~~(2)~~ (3), fix a reasonable time within which
15 either may amend the election so that both shall have elected
16 the same exemptions. The order shall notify the debtors that
17 unless they elect the same exemptions within the time fixed

18 by the court, they will be deemed to have elected the

19 exemptions provided by § 522(b)~~(1)~~ (2).

20 * * * * *

COMMITTEE NOTE

The rule is amended to conform to the change in the numbering of § 522(b) of the Code that was made as a part of the 2005 amendments. Former subsections (b)(1) and (b)(2) of § 522 were renumbered as subsections (b)(2) and (b)(3), respectively. The rule is amended to make to the parallel change.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 1017. Dismissal or Conversion of Case; Suspension

1 * * * * *

2 (e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S

3 CHAPTER 7 CASE, OR CONVERSION TO A CASE

4 UNDER CHAPTER 11 or 13, FOR ~~SUBSTANTIAL~~

5 ABUSE. The court may dismiss or, with the debtor's

6 consent, convert an individual debtor's case for ~~substantial~~
7 abuse under § 707(b) only on motion ~~by the United States~~
8 ~~trustee or on the court's own motion~~ and after a hearing on
9 notice to the debtor, the trustee, the United States trustee, and
10 any other ~~entities~~ entity as the court directs.

11 (1) Except as otherwise provided in § 704(b)(2), a ~~A~~
12 motion to dismiss a case for ~~substantial~~ abuse under § 707(b)
13 or (c) may be filed ~~by the United States trustee~~ only within 60
14 days after the first date set for the meeting of creditors under
15 § 341(a), unless, on request filed ~~by the United States trustee~~
16 before the time has expired, the court for cause extends the
17 time for filing the motion to dismiss. The ~~United States~~
18 ~~trustee~~ party filing the motion shall set forth in the motion all
19 matters to be considered ~~submitted to the court for its~~
20 ~~consideration~~ at the hearing. In addition, a motion to dismiss

21 under § 707(b)(1) and (3) shall state with particularity the

22 circumstances alleged to constitute abuse.

23 * * * * *

COMMITTEE NOTE

Subdivision (e) is amended to implement the 2005 amendments to § 707 of the Code. These statutory amendments permit conversion of a chapter 7 case to a case under chapter 11 or 13, change the basis for dismissal or conversion from "substantial abuse" to "abuse," authorize parties other than the United States trustee to bring motions under § 707(b) under certain circumstances, and add § 707(c) to create an explicit ground for dismissal based on the request of a victim of a crime of violence or drug trafficking. The conforming amendments to subdivision (e) preserve the time limits already in place for § 707(b) motions, except to the extent that § 704(b)(2) sets the deadline for the United States trustee to act. In contrast to the grounds for a motion to dismiss under § 707(b)(2), which are quite specific, the grounds under § 707(b)(1) and (3) are very general. Therefore, to enable the debtor to respond, subdivision (e) requires that motions to dismiss under § 707(b)(1) and (3) state with particularity the circumstances alleged to constitute abuse.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

1 * * * * *

2 (2) *New Filing Periods*. A new time period for filing
3 ~~claims,~~ a motion under § 707(b) or (c), a claim, a complaint
4 objecting to discharge, or a complaint to obtain a
5 determination of dischargeability of any debt shall commence
6 under ~~pursuant to~~ Rules 1017, 3002, 4004, or 4007, ~~provided~~
7 ~~that~~ but a new time period shall not commence if a chapter 7
8 case had been converted to a chapter 11, 12, or 13 case and
9 thereafter reconverted to a chapter 7 case and the time for
10 filing ~~claims,~~ a motion under § 707(b) or (c), a claim, a
11 complaint objecting to discharge, or a complaint to obtain a
12 determination of the dischargeability of any debt, or any
13 extension thereof, expired in the original chapter 7 case.

14 * * * * *

COMMITTEE NOTE

Subdivision (2) is amended to include a new filing period for motions under § 707(b) and (c) of the Code when a case is converted to chapter 7.

INTERIM RULES COMPARISON:

A minor stylistic change was made by substituting "but" for "provided that" in line 7 of the rule.

Rule 1020. ~~Election to be Considered a Small Business in a Chapter 11 Reorganization Case~~ Small Business Chapter 11 Reorganization Case

1 ~~In a chapter 11 reorganization case, a debtor that is a small~~
2 ~~business may elect to be considered a small business by filing~~
3 ~~a written statement of election not later than 60 days after the~~
4 ~~date of the order for relief.~~
5 (a) SMALL BUSINESS DEBTOR DESIGNATION. In
6 a voluntary chapter 11 case, the debtor shall state in the
7 petition whether the debtor is a small business debtor. In an

8 involuntary chapter 11 case, the debtor shall file within 15
9 days after entry of the order for relief a statement as to
10 whether the debtor is a small business debtor. Except as
11 provided in subdivision (c), the status of the case as a small
12 business case shall be in accordance with the debtor's
13 statement under this subdivision, unless and until the court
14 enters an order finding that the debtor's statement is incorrect.
15 (b) OBJECTING TO DESIGNATION. Except as
16 provided in subdivision (c), the United States trustee or a
17 party in interest may file an objection to the debtor's
18 statement under subdivision (a) no later than 30 days after the
19 conclusion of the meeting of creditors held under § 341(a) of
20 the Code, or within 30 days after any amendment to the
21 statement, whichever is later.
22 (c) APPOINTMENT OF COMMITTEE OF
23 UNSECURED CREDITORS. If a committee of unsecured

24 creditors has been appointed under § 1102(a)(1), the case
25 shall proceed as a small business case only if, and from the
26 time when, the court enters an order determining that the
27 committee has not been sufficiently active and representative
28 to provide effective oversight of the debtor and that the debtor
29 satisfies all the other requirements for being a small business.
30 A request for a determination under this subdivision may be
31 filed by the United States trustee or a party in interest only
32 within a reasonable time after the failure of the committee to
33 be sufficiently active and representative. The debtor may file
34 a request for a determination at any time as to whether the
35 committee has been sufficiently active and representative.
36 (d) PROCEDURE FOR OBJECTION OR
37 DETERMINATION. Any objection or request for a
38 determination under this rule shall be governed by Rule 9014
39 and served on: the debtor; the debtor's attorney; the United

40 States trustee; the trustee; any committee appointed under
41 § 1102 or its authorized agent, or, if no committee of
42 unsecured creditors has been appointed under § 1102, on the
43 creditors included on the list filed under Rule 1007(d); and on
any other entity as the court directs.

COMMITTEE NOTE

Under the Code, as amended in 2005, there are no longer any provisions permitting or requiring a small business debtor to elect to be treated as a small business. Therefore, the election provisions in the rule are eliminated.

The 2005 amendments to the Code include several provisions relating to small business cases under chapter 11. Section 101 includes definitions of "small business debtor" and "small business case." The purpose of the new language in this rule is to provide a procedure for informing the parties, the United States trustee, and the court of whether the debtor is a small business debtor, and to provide procedures for resolving disputes regarding the proper characterization of the debtor. Because it is important to resolve such disputes early in the case, a time limit for objecting to the debtor's self-designation is imposed. Rule 9006(b)(1), which governs enlargement of time, is applicable to the time limits set forth in this rule.

An important factor in determining whether the debtor is a small business debtor is whether the United States trustee has appointed a committee of unsecured creditors under § 1102, and whether such a committee is sufficiently active and representative. Subdivision (c), relating to the appointment and activity of a committee of unsecured creditors, is designed to be consistent with the Code's definition of "small business debtor."

INTERIM RULES COMPARISON:

Several stylistic changes were made to the rule. Since only the United States trustee can appoint a committee of unsecured creditors under § 1102, the reference to the United States trustee in subdivision (a) was deleted. The commas that set off the list of entities on whom service must be made under subdivision (d) was changed to a colon followed by semicolons to separate the entities.

Rule 1021. Health Care Business Case

1 (a) HEALTH CARE BUSINESS DESIGNATION.

2 Unless the court orders otherwise, if a petition in a case under

3 chapter 7, chapter 9, or chapter 11 states that the debtor is a

4 health care business, the case shall proceed as a case in which

5 the debtor is a health care business.

6 (b) MOTION. The United States trustee or a party in
7 interest may file a motion to determine whether the debtor is
8 a health care business. The motion shall be transmitted to the
9 United States trustee and served on: the debtor; the trustee;
10 any committee elected under § 705 or appointed under § 1102
11 of the Code or its authorized agent, or, if the case is a chapter
12 9 municipality case or a chapter 11 reorganization case and no
13 committee of unsecured creditors has been appointed under
14 § 1102, on the creditors included on the list filed under Rule
15 1007(d); and any other entity as the court directs. The motion
16 shall be governed by Rule 9014.

COMMITTEE NOTE

Section 101(27A) of the Code, added by the 2005 amendments, defines a health care business. This rule provides procedures for designating the debtor as a health care business. The debtor in a voluntary case, or petitioning creditors in an involuntary case, make that designation by checking the appropriate box on the petition. The rule also provides procedures for resolving disputes regarding the status of the debtor as a health care business.

INTERIM RULES COMPARISON:

The commas that set off the list of entities on whom service must be made under subdivision (b) was changed to a colon followed by semicolons to separate the entities.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

1 (a) TWENTY-DAY NOTICES TO PARTIES IN
2 INTEREST. Except as provided in subdivisions (h), (i), ~~and~~
3 ~~(l)~~ (*l*), (p), and (q) of this rule, the clerk, or some other person
4 as the court may direct, shall give the debtor, the trustee, all
5 creditors and indenture trustees at least 20 days' notice by
6 mail of:

7 * * * * *

8 (b) TWENTY-FIVE-DAY NOTICES TO PARTIES IN
9 INTEREST. Except as provided in subdivision (*l*) of this

10 rule, the clerk, or some other person as the court may direct,
11 shall give the debtor, the trustee, all creditors and indenture
12 trustees not less than 25 days notice by mail of ~~(1)~~ the time
13 fixed (1) for filing objections and the hearing to consider
14 approval of a disclosure statement or, under § 1125(f), to
15 make a final determination whether the plan provides
16 adequate information so that a separate disclosure statement
17 is not necessary; and (2) ~~the time fixed~~ for filing objections
18 and the hearing to consider confirmation of a chapter 9,
19 chapter 11, or chapter 13 plan.

20 (c) CONTENT OF NOTICE.

21 (1) *Proposed Use, Sale, or Lease of Property.*
22 Subject to Rule 6004 the notice of a proposed use, sale, or
23 lease of property required by subdivision (a)(2) of this rule
24 shall include the time and place of any public sale, the terms
25 and conditions of any private sale and the time fixed for filing

26 objections. The notice of a proposed use, sale, or lease of
27 property, including real estate, is sufficient if it generally
28 describes the property. The notice of a proposed sale or lease
29 of personally identifiable information under § 363(b)(1) of the
30 Code shall state whether the sale is consistent with any policy
31 prohibiting the transfer of the information.

32 * * * * *

33 (f) OTHER NOTICES. Except as provided in subdivision
34 (*l*) of this rule, the clerk, or some other person as the court
35 may direct, shall give the debtor, all creditors, and indenture
36 trustees notice by mail of:

37 (1) the order for relief;

38 (2) the dismissal or the conversion of the case to
39 another chapter, or the suspension of proceedings
40 under § 305;

41 (3) the time allowed for filing claims pursuant to
42 Rule 3002;
43 (4) the time fixed for filing a complaint objecting to
44 the debtor's discharge pursuant to § 727 of the Code
45 as provided in Rule 4004;
46 (5) the time fixed for filing a complaint to determine
47 the dischargeability of a debt pursuant to § 523 of the
48 Code as provided in Rule 4007;
49 (6) the waiver, denial, or revocation of a discharge as
50 provided in Rule 4006; (7) entry of an order
51 confirming a chapter 9, 11, or 12 plan; ~~and~~
52 (8) a summary of the trustee's final report in a
53 chapter 7 case if the net proceeds realized exceed
54 $1,500;
55 (9) a notice under Rule 5008 regarding the
56 presumption of abuse;

57 (10) a statement under § 704(b)(1) as to whether the
58 debtor's case would be presumed to be an abuse under
59 § 707(b); and
60 (11) the time to request a delay in the entry of the
61 discharge under §§ 1141(d)(5)(C), 1228(f), and 1328(h).
62 Notice of the time fixed for accepting or rejecting a plan
63 pursuant to Rule 3017(c) shall be given in accordance with
64 Rule 3017(d).
65 * * * * *
66 (g) ADDRESSING NOTICES.
67 * * * * *
68 (2) Except as provided in § 342(f) of the Code, if ~~If~~ a
69 creditor or indenture trustee has not filed a request
70 designating a mailing address under Rule 2002(g)(1), the
71 notices shall be mailed to the address shown on the list of
72 creditors or schedule of liabilities, whichever is filed later. If

73 an equity security holder has not filed a request designating a
74 mailing address under Rule 2002(g)(1), the notices shall be
75 mailed to the address shown on the list of equity security
76 holders.

77 * * * * *

78 (5) A creditor may treat a notice as not having been
79 brought to the creditor's attention under § 342(g)(1) only if,
80 prior to issuance of the notice, the creditor has filed a
81 statement that designates the name and address of the person
82 or organizational subdivision of the creditor responsible for
83 receiving notices under the Code, and that describes the
84 procedures established by the creditor to cause such notices to
85 be delivered to the designated person or subdivision.

86 * * * * *

87 (k) Unless the case is a chapter 9 municipality case or
88 unless the United States trustee requests otherwise, the clerk,

89 or some other person as the court may direct, shall transmit to
90 the United States trustee notice of the matters described in
91 subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (b), (f)(1), (f)(2),
92 (f)(4), (f)(6), (f)(7), ~~and~~ (f)(8), and (q) of this rule and notice
93 of hearings on all applications for compensation or
94 reimbursement of expenses. Notices to the United States
95 trustee shall be transmitted within the time prescribed in
96 subdivision (a) or (b) of this rule. The United States trustee
97 shall also receive notice of any other matter if such notice is
98 requested by the United States trustee or ordered by the court.
99 Nothing in these rules requires the clerk or any other person
100 to transmit to the United States trustee any notice, schedule,
101 report, application or other document in a case under the
102 Securities Investor Protection Act, 15 U.S.C. § 78aaa et. seq.
103 * * * * *
104 (p) NOTICE TO A FOREIGN CREDITOR.

105 (1) If, at the request of the United States trustee or a
106 party in interest, or on its own initiative, the court finds that
107 a notice mailed within the time prescribed by these rules
108 would not be sufficient to give a creditor with a foreign
109 address to which notices under these rules are mailed
110 reasonable notice under the circumstances, the court may
111 order that the notice be supplemented with notice by other
112 means or that the time prescribed for the notice by mail be
113 enlarged.

114 (2) Unless the court for cause orders otherwise, a
115 creditor with a foreign address to which notices under this
116 rule are mailed shall be given at least 30 days' notice of the
117 time fixed for filing a proof of claim under Rule 3002(c) or
118 Rule 3003(c).

119 (q) NOTICE OF PETITION FOR RECOGNITION OF
120 FOREIGN PROCEEDING AND OF COURT'S INTENTION

121 TO COMMUNICATE WITH FOREIGN COURTS AND
122 FOREIGN REPRESENTATIVES.
123 (1) *Notice of Petition for Recognition.* The clerk, or
124 some other person as the court may direct, shall forthwith
125 give the debtor, all administrators in foreign proceedings of
126 the debtor, all entities against whom provisional relief is
127 being sought under § 1519 of the Code, all parties to litigation
128 pending in the United States in which the debtor is a party at
129 the time of the filing of the petition, and such other entities as
130 the court may direct, at least 20 days' notice by mail of the
131 hearing on the petition for recognition of a foreign
132 proceeding. The notice shall state whether the petition seeks
133 recognition as a foreign main proceeding or foreign nonmain
134 proceeding.
135 (2) *Notice of Court's Intention to Communicate with*
136 *Foreign Courts and Foreign Representatives.* The clerk, or

137 some other person as the court may direct, shall give the
138 debtor, all administrators in foreign proceedings of the debtor,
139 all entities against whom provisional relief is being sought
140 under § 1519 of the Code, all parties to litigation pending in
141 the United States in which the debtor is a party at the time of
142 the filing of the petition, and such other entities as the court
143 may direct, notice by mail of the court's intention to
144 communicate with a foreign court or foreign representative as
145 prescribed by Rule 5012.

COMMITTEE NOTE

Subdivision (b) is amended to provide for 25 days' notice of the time for the court to make a final determination whether the plan in a small business case can serve as a disclosure statement. Conditional approval of a disclosure statement in a small business case is governed by Rule 3017.1 and does not require 25 days' notice. The court may consider this matter in a hearing combined with the confirmation hearing in a small business case.

Subdivision (c)(1) is amended to require that a trustee leasing or selling personally identifiable information under § 363(b)(1)(A) or (B) of the Code, as amended in 2005, include in the notice of the

lease or sale transaction a statement as to whether the lease or sale is consistent with a policy prohibiting the transfer of the information.

Section 1514(d) of the Code, added in 2005, requires that such additional time as is reasonable under the circumstances be given to creditors with foreign addresses with respect to notices and the filing of a proof of claim. Thus, subdivision (p)(1) is added to this rule to give the court flexibility to direct that notice by other means shall supplement notice by mail, or to enlarge the notice period, for creditors with foreign addresses. If cause exists, such as likely delays in the delivery of mailed notices in particular locations, the court may order that notice also be given by email, facsimile, or private courier. Alternatively, the court may enlarge the notice period for a creditor with a foreign address. It is expected that in most situations involving foreign creditors, fairness will not require any additional notice or extension of the notice period. This rule recognizes that the court has discretion to establish procedures to determine, on its own initiative, whether relief under subdivision (p) is appropriate, but that the court is not required to establish such procedures and may decide to act only on request of a party in interest.

Subdivisions (f)(9) and (10) are new. They reflect the 2005 amendments to §§ 342(d) and 704(b) of the Code. Section 342(d) requires the clerk to give notice to creditors shortly after the commencement of the case as to whether a presumption of abuse exists. Subdivision (f)(9) adds this notice to the list of notices that the clerk must give. Subdivision (f)(10) implements the amendment to § 704(b) which requires the court to provide a copy to all creditors of a statement by the United States trustee or bankruptcy administrator as to whether the debtor's case would be presumed to be an abuse under § 707(b) not later than five days after receiving it.

Subdivision (f)(11) is also added to provide notice to creditors of the debtor's filing of a statement in a chapter 11, 12, or 13 case that there is no reasonable cause to believe that § 522(q) applies in the case. This allows a creditor who disputes that assertion to request a delay of the entry of the discharge in the case.

Subdivision (g)(2) of the rule is amended because the 2005 amendments to § 342(f) of the Code permit creditors in chapter 7 and 13 individual debtor cases to file a notice with any bankruptcy court of the address to which the creditor wishes all notices to be sent. Rule 2002(g)(2) continues to operate in chapter 11 and 12 cases, and in chapter 7 cases when the debtor is not an individual. It also continues to apply in cases under chapters 7 and 13 if the creditor has not filed a notice under § 342(f). The amendment to Rule 2002(g)(2) therefore only limits that subdivision when a creditor files a notice under § 342(f).

New subdivision (g)(5) implements § 342(g)(1) which was added to the Code in 2005. Section 342(g)(1) allows a creditor to treat a notice as not having been brought to the creditor's attention, and so potentially ineffective, until it is received by a person or organizational subdivision that the creditor has designated to receive notices under the Bankruptcy Code. Under that section, the creditor must have established reasonable procedures for such notices to be delivered to the designated person or subdivision. The rule provides that, in order to challenge a notice under § 342(g)(1), a creditor must have filed the name and address of the designated notice recipient, as well as a description of the procedures for directing notices to that recipient, prior to the time that the challenged notice was issued. The filing required by the rule may be made as part of a creditor's filing under § 342(f), which allows a creditor to file a notice of the address

to be used by all bankruptcy courts or by particular bankruptcy courts to provide notice to the creditor in cases under chapters 7 and 13. Filing the name and address of the designated notice recipient and the procedures for directing notices to that recipient will reduce uncertainty as to the proper party for receiving notice and limit factual disputes as to whether a notice recipient has been designated and as to the nature of procedures adopted to direct notices to the recipient.

The list of notices to be transmitted to the United States trustee under subdivision (k) is amended to add notices given under subdivision (q).

Subdivision (p)(2) is added to the rule to grant creditors with a foreign address to which notices are mailed at least 30 days' notice of the time within which to file proofs of claims if notice is mailed to the foreign address, unless the court orders otherwise. If cause exists, such as likely delays in the delivery of notices in particular locations, the court may extend the notice period for creditors with foreign addresses. The court may also shorten the additional notice time if circumstances so warrant. For example, if the court in a chapter 11 case determines that supplementing the notice to a foreign creditor with notice by electronic means, such as email or facsimile, would give the creditor reasonable notice, the court may order that the creditor be given only 20 days' notice in accordance with Rule 2002(a)(7).

Subdivision (q) is added to require that notice of the hearing on the petition for recognition of a foreign proceeding be given to the debtor, all administrators in foreign proceedings of the debtor, entities against whom provisional relief is sought, and entities with whom the debtor is engaged in litigation at the time of the commencement of the

case. There is no need at this stage of the proceedings to provide notice to all creditors. If the foreign representative should take action to commence a case under another chapter of the Code, the rules governing those proceedings will operate to provide that notice is given to all creditors.

The rule also requires notice of the court's intention to communicate with a foreign court or foreign representative under Rule 5012.

INTERIM RULES COMPARISON:

A stylistic change was made to subdivision (b) by deleting as unnecessary the words "the time fixed" in line 17. Stylistic changes were made to subdivisions (q)(1) and (q)(2) by changing the order of the wording that identifies parties to litigation with the debtor. Subdivision (g)(5) was added to the rule to clarify the operation of § 342(g) of the Code. Subdivision (k) was amended to add to subdivision (q) notices to the list of items that parties must transmit to the United States trustee.

Rule 2003. Meeting of Creditors or Equity Security Holders

1 (a) DATE AND PLACE. Except as otherwise provided

2 in § 341(e) of the Code, in ~~In~~ a chapter 7 liquidation or a

3 chapter 11 reorganization case, the United States trustee shall

4 call a meeting of creditors to be held no fewer than 20 and no
5 more than 40 days after the order for relief. In a chapter 12
6 family farmer debt adjustment case, the United States trustee
7 shall call a meeting of creditors to be held no fewer than 20
8 and no more than 35 days after the order for relief. In a
9 chapter 13 individual's debt adjustment case, the United
10 States trustee shall call a meeting of creditors to be held no
11 fewer than 20 and no more than 50 days after the order for
12 relief. If there is an appeal from or a motion to vacate the
13 order for relief, or if there is a motion to dismiss the case, the
14 United States trustee may set a later date for the meeting. The
15 meeting may be held at a regular place for holding court or at
16 any other place designated by the United States trustee within
17 the district convenient for the parties in interest. If the United
18 States trustee designates a place for the meeting which is not
19 regularly staffed by the United States trustee or an assistant

20 who may preside at the meeting, the meeting may be held not

21 more than 60 days after the order for relief.

22 * * * * *

COMMITTEE NOTE

If the debtor has solicited acceptances to a plan before commencement of the case, § 341(e), which was added to the Code by the 2005 amendments, authorizes the court, on request of a party in interest and after notice and a hearing, to order that a meeting of creditors not be convened. The rule is amended to recognize that a meeting of creditors might not be held in those cases.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

1 * * * * *

2 (b) ELECTION OF TRUSTEE.

3 * * * * *

4 (3) *Report of Election and Resolution of Disputes.*

5 (A) Report of Undisputed Election. If no dispute
6 arises out of the election ~~is not disputed~~, the United States
7 trustee shall promptly file a report ~~of~~ certifying the election,
8 including the name and address of the person elected and a
9 statement that the election is undisputed. The report shall be
10 accompanied by a verified statement of the person elected
11 setting forth that person's connections with the debtor,
12 creditors, any other party in interest, their respective attorneys
13 and accountants, the United States trustee, or any person
14 employed in the office of the United States trustee. ~~The~~
15 ~~United States trustee shall file with the report an application~~
16 ~~for approval of the appointment in accordance with~~
17 ~~subdivision (c) of this rule. The report constitutes~~
18 ~~appointment of the elected person to serve as trustee, subject~~
19 ~~to court approval, as of the date of entry of the order~~
20 ~~approving the appointment.~~

21 (B) Dispute Arising Out of an ~~Disputed~~ Election.
22 If a dispute arises out of an ~~the~~ election ~~is disputed~~, the United
23 States trustee shall promptly file a report stating that the
24 election is disputed, informing the court of the nature of the
25 dispute, and listing the name and address of any candidate
26 elected under any alternative presented by the dispute. The
27 report shall be accompanied by a verified statement by each
28 candidate elected under each alternative presented by the
29 dispute, setting forth the person's connections with the debtor,
30 creditors, any other party in interest, their respective attorneys
31 and accountants, the United States trustee, ~~and~~ or any person
32 employed in the office of the United States trustee. Not later
33 than the date on which the report of the disputed election is
34 filed, the United States trustee shall mail a copy of the report
35 and each verified statement to any party in interest that has
36 made a request to convene a meeting under § 1104(b) or to

37 receive a copy of the report, and to any committee appointed
38 under § 1102 of the Code. ~~Unless a motion for the resolution~~
39 ~~of the dispute is filed not later than 10 days after the United~~
40 ~~States trustee files the report, any person appointed by the~~
41 ~~United States trustee under § 1104(d) and approved in~~
42 ~~accordance with subdivision (c) of this rule shall serve as~~
43 ~~trustee. If a motion for the resolution of the dispute is timely~~
44 ~~filed, and the court determines the result of the election and~~
45 ~~approves the person elected, the report will constitute~~
46 ~~appointment of the elected person as of the date of entry of~~
47 ~~the order approving the appointment.~~
48 (c) APPROVAL OF APPOINTMENT. An order
49 approving the appointment of a trustee ~~elected under~~
50 ~~§ 1104(b) or appointed under § 1104(d),~~ or ~~the appointment~~
51 ~~of~~ an examiner under §1104(d) of the Code, shall be made on
52 application of the United States trustee. The application shall

53 state the name of the person appointed and, to the best of the
54 applicant's knowledge, all the person's connections with the
55 debtor, creditors, any other parties in interest, their respective
56 attorneys and accountants, the United States trustee, ~~and~~ or
57 persons employed in the office of the United States trustee.
58 ~~Unless the person has been elected under § 1104(b), the~~ The
59 application shall state the names of the parties in interest with
60 whom the United States trustee consulted regarding the
61 appointment. The application shall be accompanied by a
62 verified statement of the person appointed setting forth the
63 person's connections with the debtor, creditors, any other
64 party in interest, their respective attorneys and accountants,
65 the United States trustee, ~~and~~ or any person employed in the
66 office of the United States trustee.

COMMITTEE NOTE

Under § 1104(b)(2) of the Code, as amended in 2005, if an eligible, disinterested person is elected to serve as trustee in a chapter 11 case, the United States trustee is directed to file a report certifying the election. The person elected does not have to be appointed to the position. Rather, the filing of the report certifying the election itself constitutes the appointment. The section further provides that in the event of a dispute in the election of a trustee, the court must resolve the matter. The rule is amended to be consistent with § 1104(b)(2).

When the United States trustee files a report certifying the election of a trustee, the person elected must provide a verified statement, similar to the statement required of professional persons under Rule 2014, disclosing connections with parties in interest and certain other persons connected with the case. Although court approval of the person elected is not required, the disclosure of the person's connections will enable parties in interest to determine whether the person is disinterested.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 2007.2. Appointment of Patient Care Ombudsman in a Health Care Business Case

1 (a) ORDER TO APPOINT PATIENT CARE

2 OMBUDSMAN. In a chapter 7, chapter 9, or chapter 11 case

3 in which the debtor is a health care business, the court shall
4 order the appointment of a patient care ombudsman under
5 § 333 of the Code, unless the court, on motion of the United
6 States trustee or a party in interest filed no later than 20 days
7 after the commencement of the case or within another time
8 fixed by the court, finds that the appointment of a patient care
9 ombudsman is not necessary under the specific circumstances
10 of the case for the protection of patients.
11 (b) MOTION FOR ORDER TO APPOINT
12 OMBUDSMAN. If the court has found that the appointment
13 of an ombudsman is not necessary, or has terminated the
14 appointment, the court, on motion of the United States trustee
15 or a party in interest, may order the appointment at a later
16 time if it finds that the appointment has become necessary to
17 protect patients.

18 (c) NOTICE OF APPOINTMENT. If a patient care
19 ombudsman is appointed under § 333, the United States
20 trustee shall promptly file a notice of the appointment,
21 including the name and address of the person appointed.
22 Unless the person appointed is a State Long-Term Care
23 Ombudsman, the notice shall be accompanied by a verified
24 statement of the person appointed setting forth the person's
25 connections with the debtor, creditors, patients, any other
26 party in interest, their respective attorneys and accountants,
27 the United States trustee, and any person employed in the
28 office of the United States trustee.
29 (d) TERMINATION OF APPOINTMENT. On motion
30 of the United States trustee or a party in interest, the court
31 may terminate the appointment of a patient care ombudsman
32 if the court finds that the appointment is not necessary to
33 protect patients.

34 (e) MOTION. A motion under this rule shall be governed
35 by Rule 9014. The motion shall be transmitted to the United
36 States trustee and served on: the debtor; the trustee; any
37 committee elected under § 705 or appointed under § 1102 of
38 the Code or its authorized agent, or, if the case is a chapter 9
39 municipality case or a chapter 11 reorganization case and no
40 committee of unsecured creditors has been appointed under
41 § 1102, on the creditors included on the list filed under Rule
1007(d); and such other entities as the court may direct.

COMMITTEE NOTE

Section 333 of the Code, added by the 2005 amendments, requires the court to order the appointment of a health care ombudsman within the first 30 days of a health care business case, unless the court finds that the appointment is not necessary for the protection of patients. The rule recognizes this requirement and provides a procedure by which a party may obtain a court order finding that the appointment of a patient care ombudsman is unnecessary. In the absence of a timely motion under subdivision (a) of this rule, the court will enter an order directing the United States trustee to appoint the ombudsman.

Subdivision (b) recognizes that, despite a previous order finding that a patient care ombudsman is not necessary, circumstances of the case may change or newly discovered evidence may demonstrate the necessity of an ombudsman to protect the interests of patients. In that event, a party may move the court for an order directing the appointment of an ombudsman.

When the appointment of a patient care ombudsman is ordered, the United States trustee is required to appoint a disinterested person to serve in that capacity. Court approval of the appointment is not required, but subdivision (c) requires the person appointed, if not a State Long-Term Care Ombudsman, to file a verified statement similar to the statement filed by professional persons under Rule 2014 so that parties in interest will have information relevant to disinterestedness. If a party believes that the person appointed is not disinterested, it may file a motion asking the court to find that the person is not eligible to serve.

Subdivision (d) permits parties in interest to move for the termination of the appointment of a patient care ombudsman. If the movant can show that there no longer is any need for the ombudsman, the court may order the termination of the appointment.

INTERIM RULES COMPARISON:

A stylistic change was made in subdivision (a) by reordering the words in lines 9-10. Subdivision (c) was renamed "NOTICE OF APPOINTMENT" as compared to "APPOINTMENT OF OMBUDSMAN." Subdivision (d) changed "not necessary for the protection of patients" to "not necessary to protect patients" on lines 16-17. The list in subdivision (e) is now set out by a colon and

semicolons as compared to the separation of the listed items by commas in the Interim Rule.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case <u>or Change of Status</u>

1 (a) TRUSTEE OR DEBTOR IN POSSESSION. A
2 trustee or debtor in possession shall:
3 (1) in a chapter 7 liquidation case and, if the court
4 directs, in a chapter 11 reorganization case file and transmit
5 to the United States trustee a complete inventory of the
6 property of the debtor within 30 days after qualifying as a
7 trustee or debtor in possession, unless such an inventory has
8 already been filed;
9 (2) keep a record of receipts and the disposition of
10 money and property received;
11 (3) file the reports and summaries required by
12 § 704(8) of the Code which shall include a statement, if
13 payments are made to employees, of the amounts of

14 deductions for all taxes required to be withheld or paid for
15 and in behalf of employees and the place where these amounts
16 are deposited;

17 (4) as soon as possible after the commencement of the
18 case, give notice of the case to every entity known to be
19 holding money or property subject to withdrawal or order of
20 the debtor, including every bank, savings or building and loan
21 association, public utility company, and landlord with whom
22 the debtor has a deposit, and to every insurance company
23 which has issued a policy having a cash surrender value
24 payable to the debtor, except that a notice need not be given
25 to any entity who has knowledge or has previously been
26 notified of the case;

27 (5) in a chapter 11 reorganization case, on or before
28 the last day of the month after each calendar quarter during
29 which there is a duty to pay fees under 28 U.S.C.

30 § 1930(a)(6), file and transmit to the United States trustee a
31 statement of any disbursements made during that quarter and
32 of any fees payable under 28 U.S.C. § 1930 (a)(6) for that
33 quarter; and
34 (6) in a chapter 11 small business case, unless the
35 court, for cause, sets another reporting interval, file and
36 transmit to the United States trustee for each calendar month
37 after the order for relief, on the appropriate Official Form, the
38 report required by § 308. If the order for relief is within the
39 first 15 days of a calendar month, a report shall be filed for
40 the portion of the month that follows the order for relief. If
41 the order for relief is after the 15th day of a calendar month,
42 the period for the remainder of the month shall be included in
43 the report for the next calendar month. Each report shall be
44 filed no later than 20 days after the last day of the calendar
45 month following the month covered by the report. The

46 obligation to file reports under this subparagraph terminates
47 on the effective date of the plan, or conversion or dismissal of
48 the case.

49 * * * * *

50 (d) FOREIGN REPRESENTATIVE. In a case in which
51 the court has granted recognition of a foreign proceeding
52 under chapter 15, the foreign representative shall file any
53 notice required under § 1518 of the Code within 15 days after
54 the date when the representative becomes aware of the
55 subsequent information.

56 ~~(d)~~ (e) TRANSMISSION OF REPORTS. In a chapter 11
57 case the court may direct that copies or summaries of annual
58 reports and copies or summaries of other reports shall be
59 mailed to the creditors, equity security holders, and indenture
60 trustees. The court may also direct the publication of
61 summaries of any such reports. A copy of every report or

62 summary mailed or published pursuant to this subdivision

63 shall be transmitted to the United States trustee.

COMMITTEE NOTE

Subparagraph (a)(6) implements § 308 of the Code, added by the 2005 amendments. That section requires small business chapter 11 debtors to file periodic financial and operating reports, and the rule sets the time for filing those reports and requires the use of an Official Form for the report. The obligation to file reports under this rule does not relieve the trustee or debtor of any other obligations to provide information or documents to the United States trustee.

The rule also is amended to fix the time for the filing of notices under § 1519, added to the Code in 2005. Former subdivision (d) is renumbered as subdivision (e).

Other changes are stylistic.

INTERIM RULES COMPARISON:

Subparagraph (a)(6) was not included in the Interim Rule. It is added to implement a provision of the 2005 Act, but that provision explicitly directed that it would not become effective until the proper rules and form were adopted under the Rules Enabling Act process. Therefore, this subdivision was not included in the Interim Rule. The remainder of the rule is unchanged from the Interim Rule.

Rule 2015.1. Patient Care Ombudsman

1 (a) REPORTS. Unless the court orders otherwise, a
2 patient care ombudsman, at least 10 days before making a
3 report under § 333(b)(2) of the Code, shall give notice that the
4 report will be made to the court. The notice shall be
5 transmitted to the United States trustee, posted conspicuously
6 at the health care facility that is the subject of the report, and
7 served on: the debtor; the trustee; all patients; and any
8 committee elected under § 705 or appointed under § 1102 of
9 the Code or its authorized agent, or, if the case is a chapter 9
10 municipality case or a chapter 11 reorganization case and no
11 committee of unsecured creditors has been appointed under
12 § 1102, on the creditors included on the list filed under Rule
13 1007(d); and such other entities as the court may direct. The
14 notice shall state the date and time when the report will be
15 made, the manner in which the report will be made, and, if the

16 report is in writing, the name, address, telephone number,
17 email address, and website, if any, of the person from whom
18 a copy of the report may be obtained at the debtor's expense.
19 (b) AUTHORIZATION TO REVIEW CONFIDENTIAL
20 PATIENT RECORDS. A motion by a health care
21 ombudsman under § 333(c) to review confidential patient
22 records shall be governed by Rule 9014, served on the patient
23 and any family member or other contact person whose name
24 and address has been given to the trustee or the debtor for the
25 purpose of providing information regarding the patient's
26 health care, and transmitted to the United States trustee
27 subject to applicable nonbankruptcy law relating to patient
28 privacy. Unless the court orders otherwise, a hearing on the
29 motion may not be commenced earlier than 15 days after
30 service of the motion.

COMMITTEE NOTE

This rule is new and implements § 333 of the Code, added by the 2005 amendments. Subdivision (a) is designed to give parties in interest, including patients or their representatives, sufficient notice so that they will be able to review written reports or attend hearings at which reports are made. The rule permits a notice to relate to a single report or to periodic reports to be given during the case. For example, the ombudsman may give notice that reports will be made at specified intervals or dates during the case.

Subdivision (a) of the rule also requires that the notice be posted conspicuously at the health care facility in a place where it will be seen by patients and their families or others visiting the patients. This may require posting in common areas and patient rooms within the facility. Because health care facilities and the patients they serve can vary greatly, the locations of the posted notice should be tailored to the specific facility that is the subject of the report.

Subdivision (b) requires the ombudsman to notify the patient and the United States trustee that the ombudsman is seeking access to confidential patient records so that they will be able to appear and be heard on the matter. This procedure should assist the court in reaching its decision both as to access to the records and appropriate restrictions on that access to ensure continued confidentiality. Notices given under this rule are subject to the provisions of applicable federal and state law that relate to the protection of patients' privacy, such as the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (HIPAA).

INTERIM RULES COMPARISON:

There are minor stylistic changes to this rule. In subdivision (a), the list of entities to be served is set off by a colon and semicolons rather than commas as in the Interim Rule. The last sentence of subdivision (b) is rewritten to clarify the limitation on the commencement of a hearing.

Rule 2015.2. Transfer of Patient in Health Care Business Case

1 Unless the court orders otherwise, if the debtor is a health
2 care business, the trustee may not transfer a patient to another
3 health care business under § 704(a)(12) of the Code unless the
4 trustee gives at least 10 days' notice of the transfer to the
5 patient care ombudsman, if any, the patient, and any family
6 member or other contact person whose name and address has
7 been given to the trustee or the debtor for the purpose of
8 providing information regarding the patient's health care.
9 The notice is subject to applicable nonbankruptcy law relating
10 to patient privacy.

COMMITTEE NOTE

This rule is new. Section 704(a)(12), added to the Code by the 2005 amendments, authorizes the trustee to relocate patients when a health care business debtor's facility is in the process of being closed. The Code permits the trustee to take this action without the need for any court order, but the notice required by this rule will enable a patient care ombudsman appointed under § 333, or a patient who contends that the trustee's actions violate § 704(a)(12), to have those issues resolved before the patient is transferred.

This rule also permits the court to enter an order dispensing with or altering the notice requirement in proper circumstances. For example, a facility could be closed immediately, or very quickly, such that 10 days' notice would not be possible in some instances. In that event, the court may shorten the time required for notice.

Notices given under this rule are subject to the provisions of applicable federal and state laws that relate to the protection of patients' privacy, such as the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (HIPAA).

INTERIM RULES COMPARISON:

The rule is rewritten in lines 5-7 to clarify the identities of persons to whom notices must be sent.

Rule 2015.3 Reports of Financial Information on Entities in Which a Chapter 11 Estate Holds a Controlling or Substantial Interest.

1 (a) REPORTING REQUIREMENT. In a chapter 11
2 case, the trustee or debtor in possession shall file periodic
3 financial reports of the value, operations, and profitability of
4 each entity that is not a publicly traded corporation or a debtor
5 in a case under title 11, and in which the estate holds a
6 substantial or controlling interest. The reports shall be
7 prepared as prescribed by the appropriate Official Form, and
8 shall be based upon the most recent information reasonably
9 available to the trustee or debtor in possession.
10 (b) TIME FOR FILING; SERVICE. The first report
11 required by this rule shall be filed no later than five days
12 before the first date set for the meeting of creditors under
13 § 341 of the Code. Subsequent reports shall be filed no less
14 frequently than every six months thereafter, until the effective

15 date of a plan or the case is dismissed or converted. Copies
16 of the report shall be served on the United States trustee, any
17 committee appointed under § 1102 of the Code, and any other
18 party in interest that has filed a request therefor.
19 (c) PRESUMPTION OF SUBSTANTIAL OR
20 CONTROLLING INTEREST; JUDICIAL
21 DETERMINATION. For purposes of this rule, an entity of
22 which the estate controls or owns at least a 20 percent interest
23 shall be presumed to be an entity in which the estate has a
24 substantial or controlling interest. An entity in which the
25 estate controls or owns less than a 20 percent interest shall be
26 presumed not to be an entity in which the estate has a
27 substantial or controlling interest. Upon motion, the entity,
28 any holder of an interest therein, the United States trustee, or
29 any other party in interest may seek to rebut either
30 presumption, and the court shall, after notice and a hearing,

31 determine whether the estate's interest in the entity is
32 substantial or controlling.
33 (d) MODIFICATION OF REPORTING
34 REQUIREMENT. The court may, after notice and a hearing,
35 vary the reporting requirement established by subdivision (a)
36 of this rule for cause, including that the trustee or debtor in
37 possession is not able, after a good faith effort, to comply
38 with the reporting requirement, or that the information
39 required by subdivision (a) is publicly available.
40 (e) NOTICE AND PROTECTIVE ORDERS. No later
41 than 20 days before filing the first report required by this rule,
42 the trustee or debtor in possession shall send notice to the
43 entity in which the estate has a substantial or controlling
44 interest, and to all holders – known to the trustee or debtor in
45 possession – of an interest in that entity, that the trustee or
46 debtor in possession expects to file and serve financial

47 information relating to the entity in accordance with this rule.

48 The entity in which the estate has a substantial or controlling

49 interest, or a person holding an interest in that entity, may

50 request protection of the information under § 107 of the Code.

51 (f) EFFECT OF REQUEST. Unless the court orders

52 otherwise, the pendency of a request under subdivisions (c),

53 (d), or (e) of this rule shall not alter or stay the requirements

54 of subdivision (a).

COMMITTEE NOTE

This rule implements § 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8. Reports are to be made on the appropriate Official Form. While § 419 places the obligation to report upon the "debtor," this rule extends the obligation to include cases in which a trustee has been appointed. The court can order that the reports not be filed in appropriate circumstances, such as when the information that would be included in these reports is already available to interested parties.

INTERIM RULES COMPARISON:

This rule is new and was not included in the Interim Rules. It is added to implement a provision of the 2005 Act, but that

provision explicitly directed that it would not become effective until the proper rules and form were adopted under the Rules Enabling Act process. Therefore, this subdivision was not included in the Interim Rules.

Rule 3002. Filing Proof of Claim or Interest

1 * * * * *

2 (c) TIME FOR FILING. In a chapter 7 liquidation,
3 chapter 12 family farmer's debt adjustment, or chapter 13
4 individual's debt adjustment case, a proof of claim is timely
5 filed if it is filed not later than 90 days after the first date set
6 for the meeting of creditors called under § 341(a) of the Code,
7 except as follows:

8 (1) A proof of claim filed by a governmental unit,
9 <u>other than for a claim resulting from a tax return filed under</u>
10 <u>§ 1308,</u> is timely filed if it is filed not later than 180 days after
11 the date of the order for relief. On motion of a governmental
12 unit <u>filed</u> before the expiration of such period and for cause

13 shown, the court may extend the time ~~for filing of~~ to file a
14 claim by the governmental unit. A proof of claim filed by a
15 governmental unit for a claim resulting from a tax return filed
16 under § 1308 is timely filed if it is filed not later than 180
17 days after the date of the order for relief or 60 days after the
18 tax return was filed, whichever is later.
19 * * * * *
20 (5) If notice of insufficient assets to pay a dividend
21 was given to creditors ~~pursuant to~~ under Rule 2002(e), and
22 subsequently the trustee notifies the court that payment of a
23 dividend appears possible, the clerk shall ~~notify~~ give at least
24 90 days' notice by mail to ~~the~~ creditors of that fact and ~~that~~
25 ~~they may file~~ of the date by which proofs of claim ~~within 90~~
26 ~~days after the mailing of the notice~~ must be filed.
27 (6) If notice of the time to file a proof of claim has
28 been mailed to a creditor at a foreign address, on motion filed

29 by the creditor before or after the expiration of the time, the
30 court may extend the time by not more than 60 days if the
31 court finds that the notice was insufficient under the
32 circumstances to give the creditor a reasonable time to file a
33 proof of claim.

COMMITTEE NOTE

Subdivision (c)(1) is amended to provide additional time for governmental units to file a proof of claim for tax obligations with respect to tax returns filed during the pendency of a chapter 13 case. This implements § 1308, added by the 2005 amendments, which requires that chapter 13 debtors file tax returns during the pendency of the case, and imposes bankruptcy-related consequences if debtors fail to do so.

Subdivision (c)(5) of the rule is amended to set a new period for providing notice to creditors that they may file a proof of claim in a case in which they were previously informed that there was no need to file a claim. Under Rule 2002(e), if it appears that there will be no distribution to creditors, the creditors are notified of this fact and are informed that if assets are later discovered and a distribution is likely, that a new notice will be given to the creditors. This second notice is prescribed by Rule 3002(c)(5). The rule is amended to direct the clerk to give at least 90 days' notice of the time within which creditors may file a proof of claim. Setting the deadline in this manner allows the notices being sent to creditors to be more accurate

regarding the deadline than was possible under the prior rule. The rule previously began the 90 day notice period from the time of the mailing of the notice, a date that could vary and generally would not even be known to the creditor. Under the amended rule, the notice will identify a specific bar date for filing proofs of claim thereby being more helpful to the creditors.

Subdivision (c)(6) is added to give the court discretion to extend the time for filing a proof of claim for a creditor who received notice of the time to file the claim at a foreign address, if the court finds that the notice was not sufficient, under the particular circumstances, to give the foreign creditor a reasonable time to file a proof of claim. This amendment is designed to comply with § 1514(d), added to the Code by the 2005 amendments, and requires that the rules and orders of the court provide such additional time as is reasonable under the circumstances for foreign creditors to file claims in cases under all chapters of the Code.

Other changes are stylistic.

INTERIM RULES COMPARISON:

The word "insufficient" in subdivision (c)(6) was substituted for the words "not sufficient" in the Interim Rule. The change to subdivision (c)(5) was not included in the Interim Rule. It was made in response to problems identified with the prior version of the rule.

Rule 3003. Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases

1 * * * * *

2 (c) FILING PROOF OF CLAIM.

3 (1) *Who May File.* Any creditor or indenture trustee

4 may file a proof of claim within the time prescribed by

5 subdivision (c)(3) of this rule.

6 (2) *Who Must File.* Any creditor or equity security

7 holder whose claim or interest is not scheduled or scheduled

8 as disputed, contingent, or unliquidated shall file a proof of

9 claim or interest within the time prescribed by subdivision

10 (c)(3) of this rule; any creditor who fails to do so shall not be

11 treated as a creditor with respect to such claim for the

12 purposes of voting and distribution.

13 (3) *Time for Filing.* The court shall fix and for cause
14 shown may extend the time within which proofs of claim or
15 interest may be filed. Notwithstanding the expiration of such
16 time, a proof of claim may be filed to the extent and under the
17 conditions stated in Rule 3002(c)(2), (c)(3), ~~and~~ (c)(4), and
18 (c)(6).

19 (4) *Effect of Filing Claim or Interest.* A proof of
20 claim or interest executed and filed in accordance with this
21 subdivision shall supersede any scheduling of that claim or
22 interest pursuant to § 521(a)(1) of the Code.

23 (5) *Filing by Indenture Trustee.* An indenture trustee
24 may file a claim on behalf of all known or unknown holders
25 of securities issued pursuant to the trust instrument under
26 which it is trustee.

27 * * * * *

COMMITTEE NOTE

Subdivision (c)(3) is amended to implement § 1514(d) of the Code, which was added by the 2005 amendments. It makes the new Rule 3002(c)(6) applicable in chapter 9 and chapter 11 cases. This change was necessary so that creditors with foreign addresses can be provided such additional time as is reasonable under the circumstances to file proofs of claims.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case

1 * * * * *

2 (b) DISCLOSURE STATEMENT. In a chapter 9 or 11
3 case, a disclosure statement under § 1125 of the Code or
4 evidence showing compliance with § 1126(b) ~~of the Code~~
5 shall be filed with the plan or within a time fixed by the court,
6 unless the plan is intended to provide adequate information
7 under § 1125(f)(1). If the plan is intended to provide

8 adequate information under § 1125(f)(1), it shall be so
9 designated and Rule 3017.1 shall apply as if the plan is a
10 disclosure statement.
11 * * * * *
12 (d) STANDARD FORM SMALL BUSINESS
13 DISCLOSURE STATEMENT AND PLAN. In a small
14 business case, the court may approve a disclosure statement
15 and may confirm a plan that conform substantially to the
16 appropriate Official Forms or other standard forms approved
by the court.

COMMITTEE NOTE

Subdivision (b) is amended to recognize that, in 2005, § 1125(f)(1) was added to the Code to provide that the plan proponent in a small business case need not file a disclosure statement if the plan itself includes adequate information and the court finds that a separate disclosure statement is unnecessary. If the plan is intended to provide adequate information in a small business case, it may be conditionally approved as a disclosure statement under Rule 3017.1 and is subject to all other rules applicable to disclosure statements in small business cases.

Subdivision (d) is added to the rule to implement § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 which requires the promulgation of Official Forms for plans and disclosure statements in small business cases. Section 1125(f)(2) of the Code provides that the court may approve a disclosure statement submitted on the appropriate Official Form or on a standard form approved by the court. The rule takes no position on whether a court may require a local standard form disclosure statement or plan of reorganization in lieu of the Official Forms.

Other changes are stylistic.

INTERIM RULES COMPARISON:

The only change in the Interim Rule is the addition of subdivision (d). It implements a provision of the 2005 Act that does not become effective until the applicable rules and Official Forms become effective under the Rules Enabling Act.

Rule 3017.1. Court Consideration of Disclosure Statement in a Small Business Case

1 (a) CONDITIONAL APPROVAL OF DISCLOSURE

2 STATEMENT. ~~If the debtor is~~ In a small business case ~~and~~

3 ~~has made a timely election to be considered a small business~~

4 ~~in a chapter 11 case~~, the court may, on application of the plan

5 proponent or on its own initiative, conditionally approve a
6 disclosure statement filed in accordance with Rule 3016~~(b)~~.
7 On or before conditional approval of the disclosure statement,
8 the court shall:
9 (1) fix a time within which the holders of claims and
10 interests may accept or reject the plan;
11 (2) fix a time for filing objections to the disclosure
12 statement;
13 (3) fix a date for the hearing on final approval of the
14 disclosure statement to be held if a timely objection is filed;
15 and
16 (4) fix a date for the hearing on confirmation.
17 * * * * *

COMMITTEE NOTE

Section 101 of the Code, as amended in 2005, defines a "small business case" and "small business debtor," and eliminates any need

to elect that status. Therefore, the reference in the rule to an election is deleted.

As provided in the amendment to Rule 3016(b), a plan intended to provide adequate information in a small business case under § 1125(f)(1) may be conditionally approved and is otherwise treated as a disclosure statement under this rule.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 3019. Modification of Accepted Plan Before <u>or After</u> Confirmation in a Chapter 9 Municipality or Chapter 11 Reorganization Case

1 <u>(a) MODIFICATION OF PLAN BEFORE</u>
2 <u>CONFIRMATION.</u> In a chapter 9 or chapter 11 case, after a
3 plan has been accepted and before its confirmation, the
4 proponent may file a modification of the plan. If the court
5 finds after hearing on notice to the trustee, any committee
6 appointed under the Code, and any other entity designated by
7 the court that the proposed modification does not adversely

8 change the treatment of the claim of any creditor or the
9 interest of any equity security holder who has not accepted in
10 writing the modification, it shall be deemed accepted by all
11 creditors and equity security holders who have previously
12 accepted the plan.

13 (b) MODIFICATION OF PLAN AFTER
14 CONFIRMATION IN INDIVIDUAL DEBTOR CASE. If the
15 debtor is an individual, a request to modify the plan under
16 § 1127(e) of the Code shall identify the proponent and shall
17 be filed together with the proposed modification. The clerk,
18 or some other person as the court may direct, shall give the
19 debtor, the trustee, and all creditors not less than 20 days'
20 notice by mail of the time fixed to file objections and, if an
21 objection is filed, the hearing to consider the proposed
22 modification, unless the court orders otherwise with respect
23 to creditors who are not affected by the proposed

24 modification. A copy of the notice shall be transmitted to the
25 United States trustee, together with a copy of the proposed
26 modification. Any objection to the proposed modification
27 shall be filed and served on the debtor, the proponent of the
28 modification, the trustee, and any other entity designated by
29 the court, and shall be transmitted to the United States trustee.
30 An objection to a proposed modification is governed by Rule
31 9014.

COMMITTEE NOTE

Section 1127 of the Code, amended by the 2005 amendments, provides for modification of a confirmed plan in a chapter 11 case of an individual debtor. The rule is amended to establish the procedure for filing and objecting to a proposed modification of a confirmed plan.

INTERIM RULES COMPARISON:

Headings were inserted for the subdivisions of the rule, but no other changes were made from the Interim Rule.

Rule 4002. Duties of Debtor

1 (a) IN GENERAL. In addition to performing other duties
2 prescribed by the Code and rules, the debtor shall:
3 (1) attend and submit to an examination at the times
4 ordered by the court;
5 (2) attend the hearing on a complaint objecting to
6 discharge and testify, if called as a witness;
7 (3) inform the trustee immediately in writing as to the
8 location of real property in which the debtor has an interest
9 and the name and address of every person holding money or
10 property subject to the debtor's withdrawal or order if a
11 schedule of property has not yet been filed pursuant to Rule
12 1007;
13 (4) cooperate with the trustee in the preparation of an
14 inventory, the examination of proofs of claim, and the
15 administration of the estate; and

16 (5) file a statement of any change of the debtor's
17 address.
18 (b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE
19 DOCUMENTATION.
20 (1) *Personal Identification.* Every individual debtor
21 shall bring to the meeting of creditors under § 341:
22 (A) a picture identification issued by a
23 governmental unit, or other personal identifying information
24 that establishes the debtor's identity; and
25 (B) evidence of social-security number(s), or a
26 written statement that such documentation does not exist.
27 (2) *Financial Information.* Every individual debtor
28 shall bring to the meeting of creditors under § 341, and make
29 available to the trustee, the following documents or copies of
30 them, or provide a written statement that the documentation
31 does not exist or is not in the debtor's possession:

32 (A) evidence of current income such as the most
33 recent payment advice;
34 (B) unless the trustee or the United States trustee
35 instructs otherwise, statements for each of the debtor's
36 depository and investment accounts, including checking,
37 savings, and money market accounts, mutual funds and
38 brokerage accounts for the time period that includes the date
39 of the filing of the petition; and
40 (C) documentation of monthly expenses claimed
41 by the debtor if required by § 707(b)(2)(A) or (B).
42 (3) *Tax Return.* At least 7 days before the first date
43 set for the meeting of creditors under § 341, the debtor shall
44 provide to the trustee a copy of the debtor's federal income
45 tax return for the most recent tax year ending immediately
46 before the commencement of the case and for which a return
47 was filed, including any attachments, or a transcript of the tax

48 return, or provide a written statement that the documentation
49 does not exist.
50 (4) *Tax Returns Provided to Creditors.* If a creditor,
51 at least 15 days before the first date set for the meeting of
52 creditors under § 341, requests a copy of the debtor's tax
53 return that is to be provided to the trustee under subdivision
54 (b)(3), the debtor, at least 7 days before the first date set for
55 the meeting of creditors under § 341, shall provide to the
56 requesting creditor a copy of the return, including any
57 attachments, or a transcript of the tax return, or provide a
58 written statement that the documentation does not exist.
59 (5) *Confidentiality of Tax Information.* The debtor's
60 obligation to provide tax returns under Rule 4002(b)(3) and
61 (b)(4) is subject to procedures for safeguarding the
62 confidentiality of tax information established by the Director
63 of the Administrative Office of the United States Courts.

COMMITTEE NOTE

This rule is amended to implement § 521(a)(1)(B)(iv) and (e)(2), added to the Code by the 2005 amendments. These Code amendments expressly require the debtor to file with the court, or provide to the trustee, specific documents. The amendments to the rule implement these obligations and establish a time frame for creditors to make requests for a copy of the debtor's federal income tax return. The rule also requires the debtor to provide documentation in support of claimed expenses under § 707(b)(2)(A) and (B).

Subdivision (b) is also amended to require the debtor to cooperate with the trustee by providing materials and documents necessary to assist the trustee in the performance of the trustee's duties. Nothing in the rule, however, is intended to limit or restrict the debtor's duties under § 521, or to limit the access of the Attorney General to any information provided by the debtor in the case. The rule does not require that the debtor create documents or obtain documents from third parties; rather, the debtor's obligation is to bring to the § 341 meeting of creditors the documents which the debtor possesses. Any written statement that the debtor provides indicating either that documents do not exist or are not in the debtor's possession must be verified or contain an unsworn declaration as required under Rule 1008.

Because the amendment implements the debtor's duty to cooperate with the trustee, the materials provided to the trustee would not be made available to any other party in interest at the § 341

meeting of creditors other than the Attorney General. Some of the documents may contain otherwise private information that should not be disseminated. For example, pay stubs and financial-account statements might include the social-security numbers of the debtor and the debtor's spouse and dependents, as well as the names of the debtor's children. The debtor should redact all but the last four digits of all social-security numbers and the names of any minors when they appear in these documents. This type of information would not usually be needed by creditors and others who may be attending the meeting. If a creditor perceives a need to review specific documents or other evidence, the creditor may proceed under Rule 2004.

Tax information produced under this rule is subject to procedures for safeguarding confidentiality established by the Director of the Administrative Office of the United States Courts.

INTERIM RULES COMPARISON:

There are several minor changes to the rule. The word "if" is substituted for "when" and "Federal" becomes "federal." The language of the rule is reordered to improve its clarity..

Rule 4003. Exemptions

1 * * * * *

2 (b) OBJECTING TO A CLAIM OF EXEMPTIONS.

3 (1) Except as provided in paragraphs (2) and (3), a~~A~~

4 party in interest may file an objection to the list of property

5 claimed as exempt ~~only~~ within ~~30~~ 60 days after the meeting
6 of creditors held under § 341(a) is concluded or within 30
7 days after any amendment to the list or supplemental
8 schedules is filed, whichever is later. The court may, for
9 cause, extend the time for filing objections if, before the time
10 to object expires, a party in interest files a request for an
11 extension.

12 (2) The trustee may file an objection to a claim of
13 exemption at any time prior to one year after the closing of
14 the case if the debtor fraudulently asserted the claim of
15 exemption. The trustee shall deliver or mail the objection to
16 the person filing the list and the person's attorney.

17 (3) An objection to a claim of exemption based on
18 § 522(q) shall be filed before the closing of the case. If an
19 exemption is first claimed after a case is reopened, an
20 objection shall be filed before the reopened case is closed.

21 (4) ~~Copies~~ A copy of ~~the~~ any objection ~~objections~~

22 shall be delivered or mailed to the trustee, the person filing

23 the list, and the person's attorney ~~for that person~~.

24 * * * * *

25 (d) AVOIDANCE BY DEBTOR OF TRANSFERS OF

26 EXEMPT PROPERTY. A proceeding by the debtor to avoid

27 a lien or other transfer of property exempt under § 522(f) of

28 the Code shall be by motion in accordance with Rule 9014.

29 Notwithstanding the provisions of subdivision (b), a creditor

30 may object to a motion filed under § 522(f) by challenging the

31 validity of the exemption asserted to be impaired by the lien.

COMMITTEE NOTE

Subdivision (b) is rewritten to include four subparagraphs.

Subdivision (b)(1) is amended to extend the deadline for objections to exemptions from 30 days to 60 days after the conclusion of the meeting of creditors held under § 341(a). The deadline for objecting to exemptions is short, and the Supreme Court has held that the deadline is relatively inelastic. Taylor v. Freland & Kronz, 503

U.S. 638 (1992). As a result of the amendment to § 522(a)(3) of the Code in 2005, the trustee and creditors may need more time to evaluate the exemptions claimed by the debtor and, in particular, whether the debtor's claimed exemption is based on the law of the appropriate jurisdiction.

Subdivision (b)(2) is added to the rule to permit the trustee to object to an exemption at any time up to one year after the closing of the case if the debtor fraudulently claimed the exemption. Extending the deadline for trustees to object to an exemption when the exemption claim has been fraudulently made will permit the court to review and, in proper circumstances, deny improperly claimed exemptions, thereby protecting the legitimate interests of creditors and the bankruptcy estate. However, similar to the deadline set in §727(e) for revoking a discharge which was fraudulently obtained, an objection to an exemption that was fraudulently claimed must be filed within one year after the closing of the case. Subdivision (b)(2) extends the objection deadline only for trustees.

Subdivision (b)(3) is added to the rule to reflect the addition of subsection (q) to § 522 of the Code by the 2005 Act. Section 522(q) imposes a $125,000 limit on a state homestead exemption if the debtor has been convicted of a felony or owes a debt arising from certain causes of action. Other revised provisions of the Code, such as § 727(a)(12) and § 1328(h), suggest that the court may consider issues relating to § 522 late in the case, and the 60-day period for objections would not be appropriate for this provision.

Subdivision (d) is amended to clarify that a creditor with a lien on property that the debtor is attempting to avoid on the grounds that the lien impairs an exemption may raise in defense to the lien

avoidance action any objection to the debtor's claimed exemption. The right to object is limited to an objection to the exemption of the property subject to the lien and for purposes of the lien avoidance action only. The creditor may not object to other exemption claims made by the debtor. Those objections, if any, are governed by Rule 4003(b).

Other changes are stylistic.

INTERIM RULES COMPARISON:

The general deadline for filing objections to exemptions is extended from 30 to 60 days after the first date set for the § 341 meeting of creditors. A new subdivision (b)(2) is added to the rule, and subdivisions (b)(2) and (b)(3) of the Interim Rule are redesignated as (b)(3) and (b)(4), respectively. Subdivision (d) is amended to address an issue that existed under the Code even prior to the enactment of the 2005 Act.

Rule 4004. Grant or Denial of Discharge

1 * * * * *

2 (c) GRANT OF DISCHARGE.

3 (1) In a chapter 7 case, on expiration of the time fixed

4 for filing a complaint objecting to discharge and the time

5 fixed for filing a motion to dismiss the case under Rule
6 1017(e), the court shall forthwith grant the discharge unless:
7 (A) the debtor is not an individual~~;~~ ;
8 (B) a complaint objecting to the discharge has
9 been filed~~;~~ ;
10 (C) the debtor has filed a waiver under
11 § 707(a)(10)~~;~~ ;
12 (D) a motion to dismiss the case under § 707 is
13 pending~~;~~ ;
14 (E) a motion to extend the time for filing a
15 complaint objecting to the discharge is pending~~;~~ ;
16 (F) a motion to extend the time for filing a motion
17 to dismiss the case under Rule 1017(e) is pending~~; or~~ ;
18 (G) the debtor has not paid in full the filing fee
19 prescribed by 28 U.S.C. § 1930(a) and any other fee
20 prescribed by the Judicial Conference of the United States

21 under 28 U.S.C. § 1930(b) that is payable to the clerk upon
22 the commencement of a case under the Code, unless the court
23 has waived the fees under 28 U.S.C. § 1930(f);
24 (H) the debtor has not filed with the court a
25 statement of completion of a course concerning personal
26 financial management as required by Rule 1007(b)(7);
27 (I) a motion to delay or postpone discharge under
28 § 727(a)(12) is pending;
29 (J) a motion to enlarge the time to file a
30 reaffirmation agreement under Rule 4008(a) is pending;
31 (K) a presumption has arisen under § 524(m) that
32 a reaffirmation agreement is an undue hardship; or
33 (L) a motion is pending to delay discharge because
34 the debtor has not filed with the court all tax documents
35 required to be filed under § 521(f).
36 * * * * *

37 (3) If the debtor is required to file a statement under

38 Rule 1007(b)(8), the court shall not grant a discharge earlier

39 than 30 days after the statement is filed.

40 * * * * *

COMMITTEE NOTE

Subdivision (c)(1)(G) is amended to reflect the fee waiver provision in 28 U.S.C. § 1930, added by the 2005 amendments.

Subdivision (c)(1)(H) is new. It reflects the 2005 addition to the Code of §§ 727(a)(11) and 1328(g), which require that individual debtors complete a course in personal financial management as a condition to the entry of a discharge. Including this requirement in the rule helps prevent the inadvertent entry of a discharge when the debtor has not complied with this requirement. If a debtor fails to file the required statement regarding a personal financial management course, the clerk will close the bankruptcy case without the entry of a discharge.

Subdivision (c)(1)(I) is new. It reflects the 2005 addition to the Code of § 727(a)(12). This provision is linked to § 522(q). Section 522(q) limits the availability of the homestead exemption for individuals who have been convicted of a felony or who owe a debt arising from certain causes of action within a particular time frame. The existence of reasonable cause to believe that § 522(q) may be applicable to the debtor constitutes grounds for withholding the discharge.

Subdivision (c)(1)(J) is new. It accommodates the deadline for filing a reaffirmation agreement established by Rule 4008(a).

Subdivision (c)(1)(K) is new. It reflects the 2005 revisions to § 524 of the Code that alter the requirements for approval of reaffirmation agreements. Section 524(m) sets forth circumstances under which a reaffirmation agreement is presumed to be an undue hardship. This triggers an obligation to review the presumption and may require notice and a hearing. Subdivision (c)(1)(J) has been added to prevent the discharge from being entered until the court approves or disapproves the reaffirmation agreement in accordance with § 524(m).

Subdivision (c)(1)(L) is new. It implements § 1228(a) of Public Law Number 109-8, an uncodified provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which prohibits entry of a discharge unless required tax documents have been provided to the court.

Subdivision (c)(3) is new. It postpones the entry of the discharge of an individual debtor in a case under chapter 11, 12, or 13 if there is a question as to the applicability of § 522(q) of the Code. The postponement provides an opportunity for a creditor to file a motion to limit the debtor's exemption under that provision.

Other changes are stylistic.

INTERIM RULES COMPARISON:

In subdivision (c)(1)(H), the word "concerning" is substituted for the word "in." The order of the wording in subparagraphs (K) and (L) is changed to improve clarity.

Rule 4006. Notice of No Discharge

1 If an order is entered: denying a discharge; ~~or~~ revoking a
2 discharge; ~~or if~~ approving a waiver of discharge; ~~is filed~~ or, in
3 the case of an individual debtor, closing the case without the
4 entry of a discharge, the clerk ~~, after the order becomes final~~
5 ~~or the waiver is filed~~ shall promptly ~~give notice thereof to~~
6 notify all ~~creditors~~ parties in interest in the manner provided
7 ~~in~~ by Rule 2002.

COMMITTEE NOTE

This amendment was necessary because the 2005 amendments to the Code require that individual debtors in a chapter 7 or 13 case complete a course in personal financial management as a condition to the entry of a discharge. If the debtor fails to complete the course, the case may be closed and no discharge will be entered. Reopening the case is governed by § 350 and Rule 5010. The rule is amended to

provide notice to parties in interest, including the debtor, that no discharge was entered.

INTERIM RULES COMPARISON:

Several minor stylistic changes were made from the Interim Rule. The initial list in the rule is revised slightly to make it consistent, and "give notice thereof" is changed to "notify" on lines 6-7.

Rule 4007. Determination of Dischargeability of a Debt

1 * * * * *

2 (c) TIME FOR FILING COMPLAINT UNDER § 523(c)

3 IN A CHAPTER 7 LIQUIDATION, CHAPTER 11

4 REORGANIZATION, ~~OR~~ CHAPTER 12 FAMILY

5 FARMER'S DEBT ADJUSTMENT CASE, OR CHAPTER

6 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE; NOTICE

7 OF TIME FIXED. Except as otherwise provided in

8 subdivision (d), a ~~A~~ complaint to determine the

9 dischargeability of a debt under § 523(c) shall be filed no later

10 than 60 days after the first date set for the meeting of creditors

11 under § 341(a). The court shall give all creditors no less than
12 30 days' notice of the time so fixed in the manner provided in
13 Rule 2002. On motion of a party in interest, after hearing on
14 notice, the court may for cause extend the time fixed under
15 this subdivision. The motion shall be filed before the time
16 has expired.

17 (d) TIME FOR FILING COMPLAINT UNDER § ~~523(c)~~
18 523(a)(6) IN CHAPTER 13 INDIVIDUAL'S DEBT
19 ADJUSTMENT CASE; NOTICE OF TIME FIXED. On
20 motion by a debtor for a discharge under § 1328(b), the court
21 shall enter an order fixing the time to file a complaint to
22 determine the dischargeability of any debt under § ~~523(c)~~
23 523(a)(6) and shall give no less than 30 days' notice of the
24 time fixed to all creditors in the manner provided in Rule
25 2002. On motion of any party in interest after hearing on
26 notice the court may for cause extend the time fixed under

27 this subdivision. The motion shall be filed before the time

28 has expired.

29 * * * * *

COMMITTEE NOTE

Subdivision (c) is amended because of the 2005 amendments to § 1328(a) of the Code. This revision expands the exceptions to discharge upon completion of a chapter 13 plan. Subdivision (c) extends to chapter 13 the same time limits applicable to other chapters of the Code with respect to the two exceptions to discharge that have been added to § 1328(a) and that are within § 523(c).

The amendment to subdivision (d) reflects the 2005 amendments to § 1328(a) that expands the exceptions to discharge upon completion of a chapter 13 plan, including two out of three of the provisions that fall within § 523(c). However, the 2005 revisions to § 1328(a) do not include a reference to § 523(a)(6), which is the third provision to which § 523(c) refers. Thus, subdivision (d) is now limited to that provision.

INTERIM RULES COMPARISON:

No change from the Interim Rule.

Rule 4008. ~~Discharge and Reaffirmation Hearing~~ Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement

1 (a) FILING OF REAFFIRMATION AGREEMENT. A
2 reaffirmation agreement shall be filed no later than 60 days
3 after the first date set for the meeting of creditors under
4 § 341(a) of the Code. The court may, at any time and in its
5 discretion, enlarge the time to file a reaffirmation agreement.
6 ~~Not more than 30 days following the entry of an order~~
7 ~~granting or denying a discharge, or confirming a plan in a~~
8 ~~chapter 11 reorganization case concerning an individual~~
9 ~~debtor and on not less than 10 days notice to the debtor and~~
10 ~~the trustee, the court may hold a hearing as provided in~~
11 ~~§ 524(d) of the Code. A motion by the debtor for approval of~~
12 ~~a reaffirmation agreement shall be filed before or at the~~
13 ~~hearing.~~

14 (b) STATEMENT IN SUPPORT OF REAFFIRMATION

15 AGREEMENT. The debtor's statement required under

16 § 524(k)(6)(A) shall be accompanied by a statement of the

17 total income and expenses stated on schedules I and J. If

18 there is a difference between the total income and expenses

19 stated on those schedules and the statement required under

20 § 524(k)(6)(A), the statement required by this subdivision

21 shall include an explanation of the difference.

COMMITTEE NOTE

This rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements, § 524(k)(6)(A) provides that each reaffirmation agreement must be accompanied by a statement indicating the debtor's ability to make the payments called for by the agreement. In the event that this statement reflects an insufficient income to allow payment of the reaffirmed debt, § 524(m) provides that a presumption of undue hardship arises, allowing the court to disapprove the reaffirmation agreement, but only after a hearing conducted prior to the entry of discharge. Rule 4004(c)(1)(K) accommodates this provision by delaying the entry of discharge where a presumption of undue hardship arises. However, in order for

that rule to be effective, the reaffirmation agreement itself must be filed before the entry of discharge. Under Rule 4004(c)(1) discharge is to be entered promptly after the expiration of the time for filing a complaint objecting to discharge, which, under Rule 4004(a), is 60 days after the first date set for the meeting of creditors under § 341(a). Accordingly, that date is set as the deadline for filing a reaffirmation agreement.

Any party may file the agreement with the court. Thus, whichever party has a greater incentive to enforce the agreement usually will file it. In the event that the parties are unable to file a reaffirmation agreement in a timely fashion, the rule grants the court broad discretion to permit a late filing. A corresponding change to Rule 4004(c)(1)(J) accommodates such an extension by providing for a delay in the entry of discharge during the pendency of a motion to extend the time for filing a reaffirmation agreement.

Rule 4008 is also amended by deleting provisions regarding the timing of any reaffirmation and discharge hearing. As noted above, § 524(m) itself requires that hearings on undue hardship be conducted prior to the entry of discharge. In other respects, including hearings to approve reaffirmation agreements of unrepresented debtors under § 524(c)(6), the rule leaves discretion to the court to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

INTERIM RULES COMPARISON:

Th Interim Rule is rewritten to change the deadline for filing a reaffirmation agreement from "30 days following the entry of a

discharge" to "60 days after the first date set for the § 341 meeting of creditors." The new deadline permits the court to hold a timely hearing on the enforceability of reaffirmation agreements when the debtor's income appears insufficient to meet the reaffirmation obligation.

Rule 5001. Courts and Clerks' Offices

1 * * * * *

2 (b) TRIALS AND HEARINGS; ORDERS IN
3 CHAMBERS. All trials and hearings shall be conducted in
4 open court and so far as convenient in a regular court room.
5 Except as otherwise provided in 28 U.S.C. § 152(c), all ~~All~~
6 other acts or proceedings may be done or conducted by a
7 judge in chambers and at any place either within or without
8 the district; but no hearing, other than one ex parte, shall be
9 conducted outside the district without the consent of all
10 parties affected thereby.

COMMITTEE NOTE

The rule is amended to permit bankruptcy judges to hold hearings outside of the district in which the case is pending to the extent that the circumstances lead to the authorization of the court to take such action under the 2005 amendment to 28 U.S.C. § 152(c). Under that provision, bankruptcy judges may hold court outside of their districts in emergency situations and when the business of the court otherwise so requires. This amendment to the rule is intended to implement the legislation.

INTERIM RULES COMPARISON:

This rule was not included in the Interim Rules.

Rule 5003. Records Kept By the Clerk

1 * * * * *

2 (e) REGISTER OF MAILING ADDRESSES OF
3 FEDERAL AND STATE GOVERNMENTAL UNITS AND
4 CERTAIN TAXING AUTHORITIES. The United States or
5 the state or territory in which the court is located may file a
6 statement designating its mailing address. The United States,
7 state, territory, or local governmental unit responsible for

8 collecting taxes within the district in which the case is
9 pending may file a statement designating an address for
10 service of requests under § 505(b) of the Code, and the
11 designation shall describe where further information
12 concerning additional requirements for filing such requests
13 may be found. The clerk shall keep, in the form and manner
14 as the Director of the Administrative Office of the United
15 States Courts may prescribe, a register that includes ~~these~~ the
16 mailing addresses designated under this subdivision, but the
17 clerk is not required to include in the register more than one
18 mailing address for each department, agency, or
19 instrumentality of the United States or the state or territory.
20 If more than one address for a department, agency, or
21 instrumentality is included in the register, the clerk shall also
22 include information that would enable a user of the register to
23 determine the circumstances when each address is applicable,

24 and mailing notice to only one applicable address is sufficient
25 to provide effective notice. The clerk shall update the register
26 annually, effective January 2 of each year. The mailing
27 address in the register is conclusively presumed to be a proper
28 address for the governmental unit, but the failure to use that
29 mailing address does not invalidate any notice that is
30 otherwise effective under applicable law.
31 * * * * *

COMMITTEE NOTE

The rule is amended to implement § 505(b)(1) of the Code, added by the 2005 amendments, which allows taxing authorities to designate addresses to use for the service of a request under that subsection.

INTERIM RULES COMPARISON:

In line 8, "responsible for collecting taxes" is substituted for "responsible for the collection of taxes" in the Interim Rule.

Rule 5008. Notice Regarding Presumption of Abuse in Chapter 7 Cases of Individual Debtors

1 If a presumption of abuse has arisen under § 707(b) in a
2 chapter 7 case of an individual with primarily consumer debts,
3 the clerk shall within 10 days after the date of the filing of the
4 petition notify creditors of the presumption of abuse in
5 accordance with Rule 2002. If the debtor has not filed a
6 statement indicating whether a presumption of abuse has
7 arisen, the clerk shall within 10 days after the date of the
8 filing of the petition notify creditors that the debtor has not
9 filed the statement and that further notice will be given if a
10 later filed statement indicates that a presumption of abuse has
11 arisen. If a debtor later files a statement indicating that a
12 presumption of abuse has arisen, the clerk shall notify
13 creditors of the presumption of abuse as promptly as
14 practicable.

COMMITTEE NOTE

This rule is new. The 2005 amendments to § 342 of the Code require that clerks give written notice to all creditors not later than 10 days after the date of the filing of the petition that a presumption of abuse has arisen under § 707(b). A statement filed by the debtor will be the source of the clerk's information about the presumption of abuse. This rule enables the clerk to meet its obligation to send the notice within the statutory time period set forth in § 342. In the event that the court receives the debtor's statement after the clerk has sent the first notice, and the debtor's statement indicates a presumption of abuse, the rule requires that the clerk send a second notice.

INTERIM RULES COMPARISON:

The order of the wording in the first sentence of the rule is changed to emphasize that the subdivision applies when a specific presumption arises. The words "shall notify" are substituted for "shall give notice to."

Rule 5012. Communication and Cooperation With Foreign Courts and Foreign Representatives

1 Except for a communication concerning scheduling or
2 administration, the court in a case commenced by a foreign
3 representative shall give at least 20 days' notice of its intent

4 to communicate with a foreign court or a foreign
5 representative. The notice shall identify the subject of the
6 anticipated communication and shall be given in the manner
7 provided by Rule 2002(q). Any entity that wishes to
8 participate in the communication shall notify the court of its
9 intention no later than 5 days before the scheduled
communication.

COMMITTEE NOTE

This rule is new. It implements § 1525 which was added to the Code by the 2005 amendments. The rule provides an opportunity for parties in the case to take appropriate action prior to the communication between courts, or between the court and a foreign representative, to establish procedures for the manner of the communication and the right to participate in the communication. Participation in the communication includes both active and passive participation. Parties wishing to participate must notify the court at least 5 days before the hearing so that ample time exists to make arrangements necessary to permit the participation.

INTERIM RULES COMPARISON:

The only change from the Interim Rule is that the word "concerning" is substituted for the word "for" in line 1.

Rule 6004. Use, Sale, or Lease of Property

1 * * * * *

2 (g) SALE OF PERSONALLY IDENTIFIABLE

3 INFORMATION.

4 (1) *Motion.* A motion for authority to sell or lease

5 personally identifiable information under § 363(b)(1)(B)

6 shall include a request for an order directing the United

7 States trustee to appoint a consumer privacy ombudsman

8 under § 332. Rule 9014 governs the motion which shall

9 be served on: any committee elected under § 705 or

10 appointed under § 1102 of the Code, or if the case is a

11 chapter 11 reorganization case and no committee of

12 unsecured creditors has been appointed under § 1102, on

13 the creditors included on the list of creditors filed under
14 Rule 1007(d); and on such other entities as the court may
15 direct. The motion shall be transmitted to the United
16 States trustee.
17 (2) *Appointment.* If a consumer privacy ombudsman
18 is appointed under § 332, no later than 5 days before the
19 hearing on the motion under § 363(b)(1)(B), the United States
20 trustee shall file a notice of the appointment, including the
21 name and address of the person appointed. The United States
22 trustee's notice shall be accompanied by a verified statement
23 of the person appointed setting forth the person's connections
24 with the debtor, creditors, any other party in interest, their
25 respective attorneys and accountants, the United States
26 trustee, or any person employed in the office of the United
27 States trustee.

28 ~~(g)~~ (h) STAY OF ORDER AUTHORIZING USE, SALE,
29 OR LEASE OF PROPERTY. An order authorizing the use,
30 sale, or lease of property other than cash collateral is stayed
31 until the expiration of 10 days after entry of the order, unless
32 the court orders otherwise.

COMMITTEE NOTE

This rule is amended by inserting a new subdivision (g) to implement §§ 332 and 363(b)(1)(B) of the Code, added by the 2005 amendments. Former subdivision (g) is redesignated as subdivision (h).

INTERIM RULES COMPARISON:

The second sentence of subdivision (g)(1) is rewritten in the active voice, and the list is set off by a colon and semicolons rather than by commas as in the Interim Rule.

Rule 6011. Disposal of Patient Records in Health Care Business Case

1 (a) NOTICE BY PUBLICATION UNDER § 351(1)(A).
2 A notice regarding the claiming or disposing of patient

3 records under § 351(1)(A) shall not identify any patient by
4 name or other identifying information, but shall:
5 (1) identify with particularity the health care facility
6 whose patient records the trustee proposes to destroy;
7 (2) state the name, address, telephone number, email
8 address, and website, if any, of a person from whom
9 information about the patient records may be obtained;
10 (3) state how to claim the patient records; and
11 (4) state the date by which patient records must be
12 claimed, and that if they are not so claimed the records will be
13 destroyed.
14 (b) NOTICE BY MAIL UNDER § 351(1)(B). Subject to
15 applicable nonbankruptcy law relating to patient privacy, a
16 notice regarding the claiming or disposing of patient records
17 under § 351(1) (B) shall, in addition to including the
18 information in subdivision (a), direct that a patient's family

19 member or other representative who receives the notice
20 inform the patient of the notice. Any notice under this
21 subdivision shall be mailed to the patient and any family
22 member or other contact person whose name and address has
23 been given to the trustee or the debtor for the purpose of
24 providing information regarding the patient's health care, and
25 to any insurance company known to have provided health care
26 insurance to the patient.
27 (c) PROOF OF COMPLIANCE WITH NOTICE
28 REQUIREMENT. Unless the court orders the trustee to file
29 proof of compliance with § 351(1)(B) under seal, the trustee
30 shall not file, but shall maintain, the proof of compliance for
31 a reasonable time.
32 (d) REPORT OF DESTRUCTION OF RECORDS. The
33 trustee shall file, no later than 30 days after the destruction of
34 patient records under § 351(3), a report certifying that the

35 unclaimed records have been destroyed and explaining the

36 method used to effect the destruction. The report shall not

37 identify any patient by name or other identifying information.

COMMITTEE NOTE

This rule is new. It implements § 351(1), which was added to the Code by the 2005 amendments. That provision requires the trustee to notify patients that their patient records will be destroyed if they remain unclaimed for one year after the publication of a notice in an appropriate newspaper. The Code provision also requires that individualized notice be sent to each patient and to the patient's family member or other contact person.

The variety of health care businesses and the range of current and former patients present the need for flexibility in the creation and publication of the notices that will be given. Nevertheless, there are some matters that must be included in any notice being given to patients, their family members, and contact persons to ensure that sufficient information is provided to these persons regarding the trustee's intent to dispose of patient records. Subdivision (a) of this rule lists the minimum requirements for notices given under § 351(1)(A), and subdivision (b) governs the form of notices under § 351(1)(B). Notices given under this rule are subject to provisions under applicable federal and state law that relate to the protection of patients' privacy, such as the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 (HIPAA).

Subdivision (c) directs the trustee to maintain proof of compliance with § 351(1)(B), but because the proof of compliance may contain patient names that should or must remain confidential, it prohibits filing the proof of compliance unless the court orders the trustee to file it under seal.

Subdivision (d) requires the trustee to file a report with the court regarding the destruction of patient records. This certification is intended to ensure that the trustee properly completed the destruction process. However, because the report will be filed with the court and ordinarily will be available to the public under § 107, the names, addresses, and other identifying information of patients are not to be included in the report to protect patient privacy.

INTERIM RULES COMPARISON:

In lines 4 and 45 of the rule, "patients" is changed to the singular, "any patient." Subdivision (a)(2) of the Interim Rule was broken into two parts, (a)(2) and (a)(3), and former (a)(3) is redesignated as (a)(4).

Rule 8001. Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals

1 * * * * *

2 (e) ELECTION TO HAVE APPEAL HEARD BY
3 DISTRICT COURT INSTEAD OF BANKRUPTCY
4 APPELLATE PANEL; WITHDRAWAL OF ELECTION.
5 (1) *Separate Writing for Election.* An election to
6 have an appeal heard by the district court under 28 U.S.C.
7 § 158(c)(1) may be made only by a statement of election
8 contained in a separate writing filed within the time
9 prescribed by 28 U.S.C. § 158(c)(1).
10 (2) *Withdrawal of Election.* A request to withdraw
11 the election may be filed only by written stipulation of all the
12 parties to the appeal or their attorneys of record. Upon such
13 a stipulation, the district court may either transfer the appeal
14 to the bankruptcy appellate panel or retain the appeal in the
15 district court.
16 (f) CERTIFICATION FOR DIRECT APPEAL TO
17 COURT OF APPEALS.

18 (1) *Timely Appeal Required.* A certification of a
19 judgment, order, or decree of a bankruptcy court to a court of
20 appeals under 28 U.S.C. § 158(d)(2) shall not be effective
21 until a timely appeal has been taken in the manner required by
22 subdivisions (a) or (b) of this rule and the notice of appeal has
23 become effective under Rule 8002.

24 (2) *Court Where Certification Made and Filed.* A
25 certification that a circumstance specified in 28 U.S.C.
26 § 158(d)(2)(A)(i)-(iii) exists shall be filed in the court in
27 which a matter is pending for purposes of 28 U.S.C.
28 § 158(d)(2) and this rule. A matter is pending in a bankruptcy
29 court until the docketing, in accordance with Rule 8007(b), of
30 an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the
31 grant of leave to appeal under 28 U.S.C. § 158(a)(3). A matter
32 is pending in a district court or bankruptcy appellate panel
33 after the docketing, in accordance with Rule 8007(b), of an

34 appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the grant
35 of leave to appeal under 28 U.S.C. § 158(a)(3).
36 (A) Certification by Court on Request or Court's
37 Own Initiative.
38 (i) Before Docketing or Grant of Leave to
39 Appeal. Only a bankruptcy court may make a certification on
40 request or on its own initiative while the matter is pending in
41 the bankruptcy court.
42 (ii) After Docketing or Grant of Leave to
43 Appeal. Only the district court or bankruptcy appellate panel
44 involved may make a certification on request of the parties or
45 on its own initiative while the matter is pending in the district
46 court or bankruptcy appellate panel.
47 (B) Certification by All Appellants and Appellees
48 Acting Jointly. A certification by all the appellants and
49 appellees, if any, acting jointly may be made by filing the

50 appropriate Official Form with the clerk of the court in which
51 the matter is pending. The certification may be accompanied
52 by a short statement of the basis for the certification, which
53 may include the information listed in subdivision (f)(3)(C) of
54 this rule.

55 (3) *Request for Certification; Filing; Service;*
56 *Contents.*

57 (A) A request for certification shall be filed,
58 within the time specified by 28 U.S.C. § 158(d)(2), with the
59 clerk of the court in which the matter is pending.

60 (B) Notice of the filing of a request for
61 certification shall be served in the manner required for service
62 of a notice of appeal under Rule 8004.

63 (C) A request for certification shall include the
64 following:

65 (i) the facts necessary to understand the
66 question presented;
67 (ii) the question itself;
68 (iii) the relief sought;
69 (iv) the reasons why the appeal should be
70 allowed and is authorized by statute or rule, including why a
71 circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)
72 exists; and
73 (v) an attached copy of the judgment, order, or
74 decree complained of and any related opinion or
75 memorandum.
76 (D) A party may file a response to a request for
77 certification or a cross request within 10 days after the notice
78 of the request is served, or another time fixed by the court.

79 (E) Rule 9014 does not govern a request, cross
80 request, or any response. The matter shall be submitted
81 without oral argument unless the court otherwise directs.
82 (F) A certification of an appeal under 28 U.S.C.
83 § 158(d)(2) shall be made in a separate document served on
84 the parties.
85 (4) *Certification on Court's Own Initiative.*
86 (A) A certification of an appeal on the court's own
87 initiative under 28 U.S.C. § 158(d)(2) shall be made in a
88 separate document served on the parties in the manner
89 required for service of a notice of appeal under Rule 8004.
90 The certification shall be accompanied by an opinion or
91 memorandum that contains the information required by
92 subdivision (f)(3)(C)(i)-(iv) of this rule.

93 (B) A party may file a supplementary short
94 statement of the basis for certification within 10 days after the
95 certification.

96 (5) *Duties of Parties After Certification.* A petition
97 for permission to appeal in accordance with F. R. App. P. 5
98 shall be filed no later than 30 days after a certification has
99 become effective as provided in subdivision (f)(1).

FEDERAL RULES OF BANKRUPTCY PROCEDURE

COMMITTEE NOTE

Subdivision (e) is amended by redesignating the subdivision as (e)(1) and adding new subdivision (e)(2). Subdivision (e)(2) explicitly recognizes the district court's authority to transfer an appeal to the bankruptcy appellate panel on two conditions: first, all of the parties to the appeal must have agreed to request the withdrawal of the election to have the district court hear the appeal; and, second, the district court must decide whether to grant the request for withdrawal. The district court has discretion either to keep the case or transfer it to the bankruptcy appellate panel, which will prevent strategic behavior by parties and avoid the wasting of judicial resources.

Subdivision (f) is added to the rule to implement the 2005 amendments to 28 U.S.C. § 158(d). That section authorizes appeals directly to the court of appeals, with that court's consent, upon certification that a ground for the appeal exists under § 158(d)(2)(A)(i)-(iii). Certification can be made by the court on its own initiative or in response to a request of a party. Certification also can be made by all of the appellants and appellees. Under subdivision (f)(1), certification is effective only when a timely appeal is commenced under subdivision (a) or (b), and a notice of appeal has been timely filed under Rule 8002. These actions will provide sufficient notice of the appeal to the circuit clerk, so the rule dispenses with the uncodified temporary procedural requirements set out in § 1233 (b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

The rule adopts a bright-line test for identifying the court in which a matter is pending. Under subdivision (f)(2), the bright-line chosen is the "docketing" under Rule 8007(b) of an appeal of an interlocutory order or decree under 28 U.S.C. § 158(a)(2) or a final judgment, order or decree under 28 U.S.C. § 158(a)(1), or the granting of leave to appeal any other interlocutory judgment, order or decree under 28 U.S.C. § 158(a)(3), whichever is earlier.

To ensure that parties are aware of a certification, the rule requires either that it be made on the Official Form (if being made by all of the parties to the appeal) or on a separate document (whether the certification is made on the court's own initiative or in response to a request by a party). This is particularly important because the rule adopts the bankruptcy practice established by Rule 8001(a) and (b) of requiring a notice of appeal in every instance, including interlocutory orders, of appeals from bankruptcy court orders, judgments, and decrees. Because this requirement is satisfied by filing the notice of appeal that takes the appeal to the district court or bankruptcy appellate panel in the first instance, the rule does not require a separate notice of appeal if a certification occurs after a district court or bankruptcy appellate panel decision.

A certification under subdivision (f)(1) does not place the appeal in the circuit court. Rather, the court of appeals must first authorize the direct appeal. Subdivision (f)(5) therefore provides that any party intending to pursue the appeal in the court of appeals must seek that permission under Rule 5 of the Federal Rules of Appellate Procedure. Subdivision (f)(5) requires that the petition for permission to appeal be filed within 30 days after an effective certification.

INTERIM RULES COMPARISON:

Subdivision (e) is amended to address a matter that is not related to the 2005 Act and was therefore not included in the Interim Rule. Subdivision (f)(5) was added to advise parties that certification of an order or decree is insufficient to have the court of appeals hear the matter. They still must seek permission from the court of appeals before the appeal will be pending in the court of appeals.

Rule 8003. Leave to Appeal

1 * * * * *

2 (d) REQUIREMENT OF LEAVE TO APPEAL. If leave
3 to appeal is required by 28 U.S.C. § 158(a) and has not earlier
4 been granted, the authorization of a direct appeal by a court of
5 appeals under 28 U.S.C. § 158(d)(2) shall be deemed to
6 satisfy the requirement for leave to appeal.

COMMITTEE NOTE

The rule is amended to add subdivision (d) to solve the jurisdictional problem that could otherwise ensue when a district court or bankruptcy appellate panel has not granted leave to appeal under 28 U.S.C. § 158(a)(3). If the court of appeals accepts the

appeal, the requirement of leave to appeal is deemed satisfied. However, if the court of appeals does not authorize a direct appeal, the question of whether to grant leave to appeal remains a matter to be resolved by the district court or the bankruptcy appellate panel.

INTERIM RULES COMPARISON:

A heading was added to subdivision (d).

Rule 9006. Time

1 * * * * *

2 (b) ENLARGEMENT.

3 (1) *In General.* Except as provided in paragraphs (2)
4 and (3) of this subdivision, when an act is required or allowed
5 to be done at or within a specified period by these rules or by
6 a notice given thereunder or by order of court, the court for
7 cause shown may at any time in its discretion (1) with or
8 without motion or notice order the period enlarged if the
9 request therefor is made before the expiration of the period
10 originally prescribed or as extended by a previous order or (2)

11 on motion made after the expiration of the specified period
12 permit the act to be done where the failure to act was the
13 result of excusable neglect.

14 (2) *Enlargement Not Permitted.* The court may not
15 enlarge the time for taking action under Rules 1007(d),
16 2003(a) and (d), 7052, 9023, and 9024.

17 (3) *Enlargement Limited.* The court may enlarge the
18 time for taking action under Rules 1006(b)(2), 1007(c) with
19 respect to the time to file schedules and statements in a small
20 business case, 1017(e), 3002(c), 4003(b), 4004(a), 4007(c),
21 4008(a), 8002 and 9033, only to the extent and under the
22 conditions stated in those rules.

23 (c) REDUCTION.

24 * * * * *

25 (2) *Reduction Not Permitted.* The court may not
26 reduce the time for taking action under ~~pursuant to~~ Rules

27 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2, (c)(2),

28 4003(a), 4004(a), 4007(c), 4008(a), 8002, and 9033(b).

29 * * * * *

COMMITTEE NOTE

Section 1116(3) of the Code, as amended by the 2005 amendments, places specific limits on the time for filing schedules and a statement of affairs in small business cases. The rule is amended to recognize that extensions of time for filing these documents are governed by Rule 1007(c), which is amended to recognize restrictions on expanding the time to file these documents in small business cases.

Subdivisions (b)(3) and (c)(2) are also amended to provide that enlargement or reduction of the time to file a reaffirmation agreement is governed by Rule 4008(a).

Other amendments are stylistic.

INTERIM RULES COMPARISON:

Rule 4008(a) is added to the list of subdivisions for which enlargement or reduction of time is limited under subdivisions (b)(3) and (c)(2) of this rule.

Rule 9009. Forms

1 Except as otherwise provided in Rule 3016(d), the ~~The~~
2 Official Forms prescribed by the Judicial Conference of the
3 United States shall be observed and used with alterations as
4 may be appropriate. Forms may be combined, and their
5 contents rearranged to permit economies in their use. The
6 Director of the Administrative Office of the United States
7 Courts may issue additional forms for use under the Code.
8 The forms shall be construed as consistent with these Rules
9 and the Code.

COMMITTEE NOTE

The rule is amended to provide that a plan proponent in a small business chapter 11 case need not use an Official Form of a plan of reorganization and disclosure statement. The use of those forms is optional, and under Rule 3016(d) the proponent may submit a plan and disclosure statement in those cases that does not conform to the Official Forms.

11-C

INTERIM RULES COMPARISON:

There are two changes from the Interim Rule. First, the last sentence of the Interim Rule is deleted because the Interim Rules will no longer be effective when these rules are finally promulgated and effective. Second, an exception is added to the rule to prevent the promulgation of a form plan and disclosure statement in small business chapter 11 cases from prohibiting the use of other plans and disclosure statements in those cases as contemplated by the 2005 Act.

3. Synopsis of Amendment to Interim Rule 1007 Recommended for Approval Effective October 1, 2006:

(a) **Interim Rule 1007** is amended to require a debtor to file an Official Form that includes a statement of the debtor's compliance with the prepetition credit counseling obligation of § 109(h) of the Code. The statement will ensure that debtors either will have complied with the obligation or are requesting an exception from the obligation under the standards set out in the Code. **The Advisory Committee recommends that this amendment to the Interim Rules be approved and recommended to the courts for their adoption by standing order effective on October 1, 2006.**

4. Text of Amendment to Proposed Interim Rule 1007.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Interim Rule 1007. Lists, Schedules ~~and~~ Statements, and Other Documents; Time Limits[**]

1 * * * * *

2 (b) SCHEDULES, STATEMENTS, AND OTHER

3 DOCUMENTS REQUIRED.

4 * * * * *

5 (3) Unless the United States trustee has determined

6 that the credit counseling requirement of § 109(h) does not

7 apply in the district, an individual debtor must file ~~the~~

8 ~~certificate and debt repayment plan, if any, required by~~

9 ~~§ 521(b), a certification under § 109(h)(3), or a request for a~~

10 ~~determination by the court under § 109(h)(4).~~ a statement of

11 compliance with the credit counseling requirement, prepared

---

[**] The amendments are proposed to Interim Rule 1007. Therefore, the underlined additions and the strikeout deletions are to the Interim Rule adopted by the courts on or about October 17, 2005, and not to the existing national rule. This amendment is intended to operate along with the adoption of the amendments to Official Form 1, the voluntary petition.

12 as prescribed by the appropriate Official Form which must
13 include one of the following:
14 (A) an attached certificate and debt repayment
15 plan, if any, required by § 521(b);
16 (B) a statement that the debtor has received the
17 credit counseling briefing required by § 109(h)(1) but does
18 not have the certificate required by § 521(b);
19 (C) a certification under § 109(h)(3); or
20 (D) a request for a determination by the court
21 under § 109(h)(4).
22 * * * * *
23 (c) TIME LIMITS. In a voluntary case, the schedules,
24 ~~and~~ statements, and other documents required by subdivision
25 (b)(1), (4), (5), and (6) shall be filed with the petition or
26 within 15 days thereafter, except as otherwise provided in
27 subdivisions (d), (e), (f), and (h) of this rule. In an

28 involuntary case, the list in subdivision (a)(2), and the
29 schedules, statements, and other documents required by
30 subdivision (b)(1) shall be filed by the debtor within 15 days
31 of the entry of the order for relief. ~~The documents required by~~
32 ~~subdivision (b)(3) shall be filed with the petition in a~~
33 ~~voluntary case. The statement required by subdivision (b)(7)~~
34 ~~shall be filed by the debtor within 45 days after the first date~~
35 ~~set for the meeting of creditors under § 341 of the Code in a~~
36 ~~chapter 7 case, and no later than the last payment made by the~~
37 ~~debtor as required by the plan or the filing of a motion for~~
38 ~~entry of a discharge under § 1328(b) in a chapter 13 case.~~
39 ~~The statement required by subdivision (b)(8) shall be filed by~~
40 ~~the debtor not earlier than the date of the last payment made~~
41 ~~under the plan or the date of the filing of a motion for entry of~~
42 ~~a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b).~~ In
43 a voluntary case, the documents required by paragraphs (A),

44 (C), and (D) of subdivision (b)(3) shall be filed with the
45 petition. Unless the court orders otherwise, if the debtor has
46 filed a statement under subdivision (b)(3)(B), the documents
47 required by subdivision (b)(3)(A) shall be filed within 15 days
48 of the order for relief. In a chapter 7 case, the debtor shall file
49 the statement required by subdivision (b)(7) within 45 days
50 after the first date set for the meeting of creditors under § 341
51 of the Code, and in a chapter 13 case no later than the date
52 when the last payment was made by the debtor as required by
53 the plan or the filing of a motion for a discharge under
54 § 1328(b). The debtor shall file the statement required by
55 subdivision (b)(8) no earlier than the date of the last payment
56 made under the plan or the date of the filing of a motion for
57 a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of
58 the Code. Lists, schedules, statements, and other documents
59 filed prior to the conversion of a case to another chapter shall

60 be deemed filed in the converted case unless the court directs
61 otherwise. Except as provided in § 1116(3), any extension of
62 time for the filing of the schedules, statements, and other
63 documents required under this rule may be granted only on
64 motion for cause shown and on notice to the United States
65 trustee, ~~and to~~ any committee elected under § 705 or
66 appointed under § 1102 of the Code, trustee, examiner, or
67 other party as the court may direct. Notice of an extension
68 shall be given to the United States trustee and to any
69 committee, trustee, or other party as the court may direct.

COMMITTEE NOTE

Subdivision (b)(3) of the rule is amended to require the debtor to file an Official Form relating to the credit counseling requirement provided by the 2005 amendments to § 109. Official Form 1 includes statements that warn the debtor of the consequences of failing to comply with the credit counseling requirement. The rule also provides that the debtor may file a statement that the debtor has received credit counseling but has not yet received a certificate from the credit counseling provider. Subdivision (c) is amended to permit the debtor to file the certificate and debt repayment plan within 15

days after the filing of the petition if a Rule 1007(b)(3)(B) statement is filed.

Other changes are stylistic.

11-D

C. Proposed Amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and New Exhibit D to Official Form 1 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1 for submission to the Judicial Conference with a request that they be made effective October 1, 2006.

1. Synopsis of Proposed Amendments:

Proposed amendments to seven Official Forms and one new Official Form, which the Advisory Committee recommends for adoption in October 2006, are summarized below. The forms and committee notes follow the summary. Some of the forms which have multiple parts are treated together, under a single form number, while others are treated as separate forms. This different treatment reflects the way each form is used. The 2005 committee notes to each form appear in full, with the proposed changes described in an "October 2006 Supplement to Committee Note" at the end of each one.

(a) Official Form 1, Voluntary Petition –

Among the provisions of the 2005 Act is a new 28 U.S.C. § 159 which establishes substantial new statistical reporting requirements concerning bankruptcy cases. Section 159 has a delayed effective date of October 17, 2006. Many of the proposed amendments to Form 1 will assist the courts in fulfilling these new statistical reporting requirements and improve the quality of the data collected. Requests for information about the debtor have been revised and the statutory definition of "consumer debt" added to obtain better information about individuals who incur personal debt to finance their business enterprises. Under § 159, statistical information about the debtor's assets and liabilities must come from the debtor's schedules; accordingly, the estimated dollar amounts and estimated number of creditors on this form have been simplified, as they now will be used primarily for case management purposes.

On page 2 of Form 1, "Exhibit D" replaces the section on page 2 which currently is labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)." Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors may not be aware of the requirement to obtain prepetition credit counseling, of the few and very narrow exceptions to that requirement, or of the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. "Exhibit D" instructs individual debtors to attach a completed Exhibit D, which is a separate, two-page document.

(b) Official Form 1, Exhibit D - Individual Debtor's Statement of Compliance with Credit Counseling Requirement -

The separate Exhibit D form contains checkboxes and information about the requirements along with instructions concerning the additional documents that are required in particular circumstances. This format is similar to that of existing Exhibits A and C to Form 1.

(c) Official Form 5, Involuntary Petition -

The changes to the form are intended to facilitate, to the extent possible in an involuntary case, the collection of the same statistical information as a in voluntary case.

(d) Official Form 6, Schedules -

In order to comply fully with the statistical reporting requirements of 28 U.S.C. §159, the "Statistical Summary of Certain Liabilities" is renamed "Statistical Summary of Certain Liabilities and Related Data," and additional information is required to be stated there. Schedules D, E, F, I, and J also are amended to facilitate reporting of the required statistical information. Schedules I and J, on which individual debtors report their "current income and current expenditures," are amended to label the totals as "average income" and "average expenses," to conform to the terminology used in § 159. The instructions on the form already direct the debtor to use averages, so this change is

stylistic rather than substantive. The Declaration Concerning Debtor's Schedules is amended in the section designated for an individual debtor to sign to reflect the fact that an individual now must complete a two-page summary.

(e) Official Form 9 - Notice of Commencement of Case, Meeting of Creditors and Deadlines -

The 2005 Act added "family fisherman" to "family farmer" as a category of debtor eligible for bankruptcy relief under chapter 12 of the Bankruptcy Code. The necessity to add "family fisherman" to Forms 9G and 9H, used to notify creditors of the filing of a case under chapter 12, was overlooked when the forms were amended in October 2005. In addition, the 2005 Act provided that the Internal Revenue Service may assert a claim in a chapter 13 case based on a debtor's income tax return filed during the three to five years the case is pending, or well after the normal deadline for filing a proof of claim. Form 9I is amended to provide general notice to parties in interest of the potential for a claim to be filed late in the case.

(f) Official Form22A - Chapter 7 Statement of Current Monthly Income and Means Test Calculation -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.*, to retain collateral.

(g) Official Form 22C - Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. Line 17 has been amended to require all chapter 13 debtors, including those whose income is below the applicable median, to complete Part III of the form. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.*, to retain collateral.

(h) Official Form 23 - Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management -

The form is amended to require the debtor to state the number of the certificate of completion issued by the personal financial management instructor, provide checkboxes for the debtor to indicate any applicable exception to fulfilling the requirement to undergo instruction, and to state the deadlines for filing the certification in a chapter 7 case and a chapter 13 case. The format has

been revised to resemble that used in Exhibit D to Form 1, described above.

11-E

2. *Proposed Amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1. (MATERIALS SEPARATELY ATTACHED)*

D. Proposed Amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and New Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26 Submitted for Publication

The Advisory Committee recommends that the Standing Committee approve the following proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and new proposed Official Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26 for publication for comment.

1. *Synopsis of Proposed Amendments.*

Proposed amendments to 20 Official Forms and five new Official Forms, which the Advisory Committee requests be published for comment by bench and bar in August 2006, are summarized below. The forms and committee notes follow the summary. The committee notes describe all the changes to the forms – those made when the forms were amended or created in October 2005, those proposed to be made in October 2006, and those proposed only in the version which the Advisory Committee requests be published for comment. Some of the forms which have multiple parts are treated together, under a single form number, while others are treated as separate forms. This different treatment reflects the way each form is used.

(a) Official Form 1, Voluntary Petition –

The changes to the form are related to a new 28 U.S.C. § 159 which was enacted as part of the 2005 Act. Section 159 establishes substantial new statistical reporting requirements concerning bankruptcy cases and has a delayed effective date of October 17, 2006. Most of the proposed amendments to Form 1 will assist the courts in fulfilling these new statistical reporting requirements and improve the quality of the data collected. Requests for information about the debtor have been revised and the statutory definition of "consumer debt" has been added to obtain better information about individuals who incur personal debt to finance their business enterprises. Under § 159, statistical information about the debtor's assets and liabilities must come from the debtor's schedules; accordingly, the estimated dollar amounts and estimated number of creditors on this form have been simplified, as they now will be used primarily for case management purposes.

An important amendment appears on page 2 of the form. "Exhibit D" replaces the section of the form labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)." Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors

may not be aware of the requirement to obtain prepetition credit counseling, of the few and very narrow exceptions to that requirement, or of the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. "Exhibit D" instructs individual debtors to attach a completed Exhibit D, which is a separate, two-page document.

(b) Official Form 1, Exhibit D - Individual Debtor's Statement of Compliance with Credit Counseling Requirement -

The separate Exhibit D form contains checkboxes and information about the requirements along with instructions concerning the additional documents that are required in particular circumstances. This format is similar to that of existing Exhibits A and C to Form 1.

(c) Official Form 3A, Application to Pay Filing Fee in Installments -

This form is unchanged from the October 2005 version.

(d) Official Form 3B, Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments -

This form is unchanged from the October 2005 version.

(e) Official Form 4, List of Creditors Holding 20 Largest Unsecured Claims -

The form is amended to provide more detail than the existing cross-reference to Rule 1007(m) concerning notification to a guardian or other appropriate adult when a minor child is a creditor in a bankruptcy case.

(f) Official Form 5, Involuntary Petition -

The changes to the form will facilitate, to the extent possible in an involuntary case, the collection of the same statistical information as a voluntary case.

(g) Official Form 6, Schedules -

Proposed changes in the form to be made in October 2006 have been incorporated in the amendments to be published. In addition, the description of the information to be provided concerning social-security and other taxpayer-identification numbers has been revised in conformity with new rule 9037. The statistical changes include renaming the "Statistical Summary of Certain Liabilities" to "Statistical Summary of Certain Liabilities and Related Data," as additional information is required to be stated there. Schedules D, E, F, I, and J also are amended to facilitate reporting of the required statistical information. Schedules I and J, on which individual debtors report their "current income and current expenditures" are amended to label the totals as "average

income" and "average expenses," to conform to the terminology used in § 159. This is a stylistic amendment only, as the instructions on the form already direct the debtor to use averages. The Declaration Concerning Debtor's Schedules is amended in the section designated for an individual debtor's signature to reflect the fact that an individual must complete a two-page summary.

(h) Official Form 7, Statement of Financial Affairs -

The form is amended to conform to new Rule 9037, but is otherwise unchanged.

(i) Official Form 8, Chapter 7 Individual Debtor's Statement of Intention -

The form is unchanged from the October 2005 version.

(j) Official Form 9 - Notice of Commencement of Case, Meeting of Creditors and Deadlines -

The 2005 Act added "family fisherman" to "family farmer" as a category of debtor eligible for bankruptcy relief under chapter 12 of the Bankruptcy Code. The necessity to add "family fisherman" to Forms 9G and 9H, used to notify creditors of the filing of a case under chapter 12, was overlooked when the forms were amended in October 2005. In addition, the 2005 Act provided that the Internal Revenue Service may assert a claim in a chapter 13 case based on a debtor's income tax return filed during the three to five years the case is pending, or well after the normal deadline for filing a proof of claim. Forms 9G, 9H, and 9I are amended to correct these initial oversights.

(k) Official Form 10 - Proof of Claim -

The 2005 Act changed the priority scheme in § 507(a) of the Code which requires conforming amendments to the form. The form also is amended to provide more accurate addresses for the transmittal of payments and notices, as well as to indicate that a particular proof of claim has been replaced. The Instructions and Definitions portions of the form have been updated to conform to the new definitions and requirements adopted by the 2005 amendments.

(l) Official Form B16A - Caption (Full) -

The form is amended to require the disclosure of all names used by the debtor in the past eight years rather than six years. The form also is amended to direct the use of only the last four digits of an individual debtor's taxpayer-identification number.

(m) Official Form 18 - Discharge of Debtor in a Chapter 7 Case -

The form is amended to require the disclosure of all names used by the debtor in the past eight years rather than six years. The form also is amended to direct the use of only the last four

digits of an individual debtor's taxpayer-identification number. The explanation portion of the form is also amended to reflect the changes to the Code governing the nondischargeability of certain obligations.

(n) Official Form 19A - Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer-

The form is amended by renaming the former certification as a "declaration" and by adding additional language mandated by the 2005 amendments to § 110 of the Code.

(o) Official Form 19B - Notice to Debtor by Non-Attorney Bankruptcy Petition Preparer-

The form is unchanged from the October 2005 version.

(p) Official Form 21 - Statement of Social-Security Number -

The form is amended to direct debtors who do not have a social-security number to furnish a taxpayer-identification number on the form.

(q) Official Form 22A - Chapter 7 Statement of Current Monthly Income and Means-Test Calculation -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.,* to retain collateral.

(r) Official Form 22B - Chapter 11 Statement of Current Monthly Income -

The form is unchanged from the October 2005 version.

(s) Official Form 22C - Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. Line 17 has been amended to require all chapter 13 debtors, including those whose income is below the applicable median, to complete Part III of the form. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.,* to retain collateral.

(t) Official Form 23 - Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management -

The form is amended to require the debtor to state the number of the certificate of completion issued by the personal financial management instructor, provide checkboxes for the debtor to indicate any applicable exception to fulfilling the requirement to undergo instruction, and to state the deadlines for filing the certification in a chapter 7 case and a chapter 13 case. The format has been revised to resemble that used in Exhibit D to Form 1, described above.

(u) Official Form 24, Certification to Court of Appeals by All Parties -

The form is unchanged from the October 2005 version.

(v) Official Form 25A, [Name of Proponent]'s Plan of Reorganization, Dated [Insert Date] -

This form is new. It implements § 433 of the 2005 Act. Section 433 specifies that the Judicial Conference is to prescribe a form of reorganization plan for use in a small business case under chapter 11 of the Code and is to do so "within a reasonable period of time after the date of enactment" of the 2005 Act. The form is intended to be used in conjunction with the small business chapter 11 disclosure statement (proposed Official Form 25B), also required to be prescribed by § 433 of the Act. Because the form is to be used in small cases, those with less than $2 million in assets, the Advisory Committee also drafted instructions for completing the form. Because the type of debtor and details of a proposed reorganization will be quite varied, the difficulties inherent in drafting a new and complex form, and the latitude in timing afforded by § 433, the Advisory Committee did not attempt to complete the form by October 2005. The Advisory Committee expects to receive useful commentary on the proposed form during the comment period.

(w) Official Form 25B, [Name of Plan Proponent]'s Disclosure Statement, Dated [Insert Date] -

This form is new. It implements § 433 of the 2005 Act. Section 433 also specifies that the Judicial Conference is to prescribe a form of disclosure statement for use in a small business case under chapter 11 of the Code and is to do so "within a reasonable period of time after the date of enactment" of the 2005 Act. The form is intended to be used in conjunction with the small business chapter 11 plan of reorganization (proposed Official Form 25A). Because the type of debtor and details of its financial circumstances will be quite varied, the difficulties inherent in drafting a new and complex form, and the latitude in timing afforded by § 433, the Advisory Committee did not attempt to complete the task by October 2005. The Advisory Committee expects to receive useful commentary on the proposed form during the comment period.

(x) Official Form 25C, Small Business Monthly Operating Report -

This form is new. It implements §§ 434 and 435 of the 2005 Act, which provide for rules and an official form to assist small business debtors in chapter 11 cases to fulfill their financial reporting responsibilities under § 308 of the Code, a provision added by the 2005 Act. Section 434 also provides that these reporting requirements will not take effect until 60 days after the effective date of an official form. Rule 2015 already requires a chapter 11 debtor that is operating a business to file reports on its operations. Currently, these debtors use forms developed locally by United States trustees and bankruptcy administrators. The proposed form directs the debtor to disclose all the information specified in § 308; it is modeled on the local forms developed by the United States trustees.

(y) Official Form 26, Periodic Report Concerning Related Entities -

This form is new. It implements § 419 of the 2005 Act, which requires every chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required under proposed new Rule 2015.3. The form was designed with input from accounting professionals and includes instructions and examples of the types of information to be provided.

2. *Proposed Amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and new proposed Official Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26. (MATERIALS SEPARATELY ATTACHED)*

III. INFORMATION ITEMS

(1) Attached to the report is a chart setting out the differences between the Interim Rules as they have been approved by the Standing Committee in August and October 2005 and the rules being proposed for publication in Part II.B.2.

(2) Attached to the report is the Bankruptcy Rules Docket.

(3) Attached to the report is the draft of the Minutes of the March 2006 meeting of the Advisory Committee.

11-F

PROPOSED AMENDMENTS TO

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23, and

NEW EXHIBIT D TO OFFICIAL FORM 1

C. Proposed Amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and New Exhibit D to Official Form 1 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1 for submission to the Judicial Conference with a request that they be made effective October 1, 2006.

1. Synopsis of Proposed Amendments:

Proposed amendments to seven Official Forms and one new Official Form, which the Advisory Committee recommends for adoption in October 2006, are summarized below. The forms and committee notes follow the summary. Some of the forms which have multiple parts are treated together, under a single form number, while others are treated as separate forms. This different treatment reflects the way each form is used. The 2005 committee notes to each form appear in full, with the proposed changes described in an "October 2006 Supplement to Committee Note" at the end of each one.

(a) Official Form 1, Voluntary Petition –

Among the provisions of the 2005 Act is a new 28 U.S.C. § 159 which establishes substantial new statistical reporting requirements concerning bankruptcy cases. Section 159 has a delayed effective date of October 17, 2006. Many of the proposed amendments to Form 1 will assist the courts in fulfilling these new statistical reporting requirements and improve the quality of the data collected. Requests for information about the debtor have been revised and the statutory definition of "consumer debt" added to obtain better information about individuals who incur personal debt to finance their business enterprises. Under § 159, statistical information about the debtor's assets and liabilities must come from the debtor's schedules; accordingly, the estimated dollar amounts and estimated number of creditors on this form have been simplified, as they now will be used primarily for case management purposes.

On page 2 of Form 1, "Exhibit D" replaces the section on page 2 which currently is labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)." Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors may not be aware of the requirement to obtain prepetition credit counseling, of the few and very narrow exceptions to that requirement, or of the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. "Exhibit D" instructs individual debtors to attach a completed Exhibit D, which is a separate, two-page document.

(b) Official Form 1, Exhibit D - Individual Debtor's Statement of Compliance with Credit Counseling Requirement -

The separate Exhibit D form contains checkboxes and information about the requirements along with instructions concerning the additional documents that are required in particular

circumstances. This format is similar to that of existing Exhibits A and C to Form 1.

(c) Official Form 5, Involuntary Petition -

The changes to the form are intended to facilitate, to the extent possible in an involuntary case, the collection of the same statistical information as a in voluntary case.

(d) Official Form 6, Schedules -

In order to comply fully with the statistical reporting requirements of 28 U.S.C. §159, the "Statistical Summary of Certain Liabilities" is renamed "Statistical Summary of Certain Liabilities and Related Data," and additional information is required to be stated there. Schedules D, E, F, I, and J also are amended to facilitate reporting of the required statistical information. Schedules I and J, on which individual debtors report their "current income and current expenditures," are amended to label the totals as "average income" and "average expenses," to conform to the terminology used in § 159. The instructions on the form already direct the debtor to use averages, so this change is stylistic rather than substantive. The Declaration Concerning Debtor's Schedules is amended in the section designated for an individual debtor to sign to reflect the fact that an individual now must complete a two-page summary.

(e) Official Form 9 - Notice of Commencement of Case, Meeting of Creditors and Deadlines -

The 2005 Act added "family fisherman" to "family farmer" as a category of debtor eligible for bankruptcy relief under chapter 12 of the Bankruptcy Code. The necessity to add "family fisherman" to Forms 9G and 9H, used to notify creditors of the filing of a case under chapter 12, was overlooked when the forms were amended in October 2005. In addition, the 2005 Act provided that the Internal Revenue Service may assert a claim in a chapter 13 case based on a debtor's income tax return filed during the three to five years the case is pending, or well after the normal deadline for filing a proof of claim. Form 9I is amended to provide general notice to parties in interest of the potential for a claim to be filed late in the case.

(f) Official Form22A - Chapter 7 Statement of Current Monthly Income and Means Test Calculation -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.,* to retain collateral.

(g) Official Form 22C - Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income -

Throughout the form, stylistic changes have been made so that the language of the form

more closely tracks that used in the statute. Line 17 has been amended to require all chapter 13 debtors, including those whose income is below the applicable median, to complete Part III of the form. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.*, to retain collateral.

(h) Official Form 23 - Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management -

The form is amended to require the debtor to state the number of the certificate of completion issued by the personal financial management instructor, provide checkboxes for the debtor to indicate any applicable exception to fulfilling the requirement to undergo instruction, and to state the deadlines for filing the certification in a chapter 7 case and a chapter 13 case. The format has been revised to resemble that used in Exhibit D to Form 1, described above.

2. *Proposed Amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1.*

(Official Form 1) (10/06)

United States Bankruptcy Court _____ DISTRICT OF _____	Voluntary Petition
Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all):	Last four digits of Soc. Sec./Complete EIN or other Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, and State): ZIP CODE	Street Address of Joint Debtor (No. & Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE	

Type of Debtor
(Form of Organization)
(Check **one** box.)

- ☐ Individual (includes Joint Debtors)
  See Exhibit D on page 2 of this form.
- ☐ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business
(Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☐ Other

Tax-Exempt Entity
(Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts
(Check one box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☐ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☐ Full Filing Fee attached.
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:
- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2 million.

Check all applicable boxes:
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

Estimated Number of Creditors

1-49	50-99	100-199	200-999	1,000-5,000	5,001-10,000	10,001-25,000	25,001-50,000	50,001-100,000	Over 100,000
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Assets

☐ $0 to $10,000	☐ $10,000 to $100,000	☐ $100,000 to $1 million	☐ $1 million to $100 million	☐ More than $100 million

Estimated Liabilities

☐ $0 to $50,000	☐ $50,000 to $100,000	☐ $100,000 to $1 million	☐ $1 million to $100 million	☐ More than $100 million

THIS SPACE IS FOR COURT USE ONLY

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s):	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Statement by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19B is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Official Form 1, Exhibit D
(10/06)

UNITED STATES BANKRUPTCY COURT

_____District of_____

In re_____ Case No._____
Debtor(s) (If known)

EXHIBIT D - INDIVIDUAL DEBTOR'S STATEMENT OF COMPLIANCE WITH CREDIT COUNSELING REQUIREMENT

Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file. If that happens, you will lose whatever filing fee you paid, and your creditors will be able to resume collection activities against you. If your case is dismissed and you file another bankruptcy case later, you may be required to pay a second filing fee and you may have to take extra steps to stop creditors' collection activities.

Every individual debtor must file this Exhibit D. If a joint petition is filed, each spouse must complete and file a separate Exhibit D. Check one of the five statements below and attach any documents as directed.

☐ 1. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, and I have a certificate from the agency describing the services provided to me. *Attach a copy of the certificate and a copy of any debt repayment plan developed through the agency.*

☐ 2. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. *You must file a copy of a certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 15 days after your bankruptcy case is filed.*

☐ 3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made my request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now. *[Must be accompanied by a motion for determination by the court.][Summarize exigent circumstances here.]*

_____

_____.

If the court is satisfied with the reasons stated in your motion, it will send you an order approving your request. You must still obtain the credit counseling briefing within the first 30 days after you file your bankruptcy case and promptly file a certificate from the agency that provided the briefing, together with a copy of any debt management plan developed through the agency. Any extension of the 30-day deadline can be granted only for cause and is limited to a maximum of 15 days. A motion for extension must be filed within the 30-day period. Failure to fulfill these requirements may result in dismissal of your case. If the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing, your case may be dismissed.

4. I am not required to receive a credit counseling briefing because of: *[Check the applicable statement.] [Must be accompanied by a motion for determination by the court.]*

☐ Incapacity. (Defined in 11 U.S.C. § 109 (h)(4) as impaired by reason of mental illness or mental deficiency so as to be incapable of realizing and making rational decisions with respect to financial responsibilities.);

☐ Disability. (Defined in 11 U.S.C. § 109(h)(4) as physically impaired to the extent of being unable, after reasonable effort, to participate in a credit counseling briefing in person, by telephone, or through the Internet.);

☐ Active military duty in a military combat zone.

☐ 5. The United States trustee or bankruptcy administrator has determined that the credit counseling requirement of 11 U.S.C. § 109(h) does not apply in this district.

I certify under penalty of perjury that the information provided above is true and correct.

Signature of Debtor: _____

Date: _____

COMMITTEE NOTE

The form is amended to implement amendments to the Bankruptcy Code contained in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). The period for which the debtor must provide all names used and information about any prior bankruptcy cases is now eight years to match the required time between the granting of discharges to the same debtor in § 727(a)(8) of the Code as amended in 2005. The box indicating the debtor's selection of a chapter under which to file the case has been amended to delete "Sec. 304 - Case ancillary to foreign proceeding" and replace it with "Chapter 15 Petition for Recognition of a Foreign Main Proceeding" and "Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding" reflecting the 2005 repeal of § 304 and enactment of chapter 15 of the Code. A statement of venue to be used in a chapter 15 case also has been added.

The section of the form labeled "Type of Debtor" has been revised and subtitled "Form of Organization." This section is revised to make it clear that a limited liability corporation ("LLC") and limited liability partnership ("LLP") should identify itself as a "corporation." A new section titled "Nature of Business" has been created that includes both existing check boxes that identify certain types of debtors for which the Bankruptcy Code provides special treatment, such as stockbrokers and railroads, and a new checkbox for a "health care business" for which the 2005 amendments to the Code include specific requirements. This section of the form also contains checkboxes for single asset real estate debtors and nonprofit organizations which will be used by trustees and creditors and by the Director of the Administrative Office of the United States Courts in preparing statistical reports and analyses. The statistical section of the form also is amended to provide more detail concerning the number of creditors in a case. A check box also has been added for a debtor to indicate that the debtor is applying for a waiver of the filing fee, to implement the 2005 enactment of 28 U.S.C. § 1930(f) authorizing the bankruptcy court to waive the filing fee in certain circumstances.

Although the 2005 Act eliminated an eligible debtor's option to elect to be treated as a "small business" in a chapter 11 case, new provisions for such debtors added to the Code in 2005 make it desirable to identify eligible debtors at the outset of the case. Accordingly, the section of the form labeled "Chapter 11 Small Business" has been revised and renamed "Chapter 11 Debtors" for this purpose. Chapter 11 debtors that meet the definition of "small business debtor" in § 101 of the Code are directed to identify themselves in this section of the form. In addition, chapter 11 debtors whose aggregate noncontingent debts owed to non-insiders or affiliates are less than $2 million are directed to identify themselves in this section.

A space is provided for individuals to certify that they have received budget and credit counseling prior to filing, as required by § 109(h) which was added to the Code in 2005, or to request a waiver of the requirement. Space also is provided for a debtor who is a tenant of residential real property to state whether the debtor's landlord has a judgment against the debtor for possession of the premises, whether under applicable nonbankruptcy law the debtor would be permitted to cure the monetary default, and whether the debtor has made the appropriate deposit with the court. This addition to the form implements § 362(l) which was added to the Code in 2005.

The signature sections and the declaration under penalty of perjury by an individual debtor concerning the notice received about bankruptcy relief, the declaration under penalty of perjury by a bankruptcy petition preparer, and the declaration and certification by an attorney all are amended to include new material mandated by the 2005 Act. A signature section also is provided for a representative of a foreign proceeding.

October 2006 Supplement to Committee Note

Page one of the form is amended in several ways to assist the courts in evaluating their workload and fulfilling the statistical reporting requirements of 28 U.S.C. § 159. Section 159 was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8 and takes effect October 17, 2006. Accordingly, in the section of the form labeled "Nature of Business," the instruction is amended to specify that only one box should be checked and only if the debtor is any of the entities listed. The "nonprofit" choice is separated into a discrete section and the language amended to the more precise "tax-exempt."

In addition, the section labeled "Type of Debtor" is amended to include, below the checkbox for "Individual or Joint," a direction to "See Exhibit D on page 2 of this form." Exhibit D replaces the certification concerning prepetition credit counseling and is described below. The section labeled "Nature of Debts" is amended to state the statutory definition of a "consumer debt" and to modify both the consumer and business categories by adding the word "primarily" to both make it clearer to individual debtors that "business" may be the more appropriate choice if personal debts have been incurred to finance a business venture.

In the section labeled "Chapter 11 Debtors," the language concerning whether the debtor owes less than $2 million is re-styled for clarity. This section also is augmented to provide the court with notice when a case if filed as a "pre-packaged" chapter 11 reorganization case. Two checkboxes are offered, using language adapted from § 1126(b) of the Code. Lastly, the information requested concerning estimated assets and liabilities is abbreviated, with the number of ranges reduced and the scope of each range amended. Statistical reports now will be derived from actual dollar amounts of assets and liabilities as shown on the debtor's schedules. The information on the petition, accordingly, is for case management and public information purposes only.

Exhibit D replaces the section formerly labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)." Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors may not be aware of the requirement to obtain prepetition credit counseling, the few and very narrow exceptions to that requirement, or the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. Accordingly, page 2 of the petition instructs individual debtors to attach a completed Exhibit D and makes it clear that each spouse in a joint case must complete and attach a separate Exhibit D. Exhibit D itself includes a warning about the requirement to obtain counseling and the consequences of failing to fulfill this requirement. It further provides checkboxes and instructions concerning the additional documents that are required in particular circumstances, in order to minimize the number of cases which the court must dismiss for ineligibility.

FORM B5 (10/06)

United States Bankruptcy Court _____ District of _____	INVOLUNTARY PETITION

IN RE (Name of Debtor – If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 8 years (Include married, maiden, and trade names.)
Last four digits of Soc. Sec. No./Complete EIN or other Tax I.D. No. (If more than one, state all.):	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS ZIP CODE	MAILING ADDRESS OF DEBTOR (If different from street address) ZIP CODE

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Nature of Debts (Check **one** box.)	Type of Debtor (Form of Organization)	Nature of Business (Check **one** box.)
Petitioners believe: ☐ Debts are primarily consumer debts ☐ Debts are primarily business debts	☐ Individual (Includes Joint Debtor) ☐ Corporation (Includes LLC and LLP) ☐ Other (If debtor is not one of the above entities, check this box and provide the information provided below.) State Type of Entity:_____	☐ Health Care Business ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51)(B) ☐ Railroad ☐ Stockbroker ☐ Commodity Broker ☐ Clearing Bank ☐ Other

VENUE	FILING FEE (Check one box)
☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.	☐ Full Filing Fee attached ☐ Petitioner is a child support creditor or its representative, and the form specified in § 304 (g) of the Bankruptcy Reform Act of 1994 is attached. *[If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304 (g) of the Bankruptcy Reform Act of 1994, no fee is required.]*

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS (Check applicable boxes)	COURT USE ONLY
1. Petitioner (s) are eligible to file this petition pursuant to 11 U.S. C. § 303 (b). 2. The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code. 3.a. The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount; or b. Within 120 days preceding the filing of this petition, a custodian, other than a trustee receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.	

Name of Debtor_____

Case No._____

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief. x_____ Signature of Petitioner or Representative (State title) Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative _____ Capacity _____	x_____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.
x_____ Signature of Petitioner or Representative (State title) Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative _____ Capacity _____	x_____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.
x_____ Signature of Petitioner or Representative (State title) Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative _____ Capacity _____	x_____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____continuation sheets attached

COMMITTEE NOTE

The form has been amended to delete statistical information no longer required and to add "as to liability or amount" to the language concerning debts that are the subject of a bona fide dispute, in conformity with § 303 of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). The petitioning creditors must now provide, to the extent known to them, all other names used by the debtor during the 8 years, rather than 6 years, before the filing of the petition. A new check box is provided for the petitioning creditors to identify the debtor that is a "health care business" as defined in § 101 of the Code, thereby alerting the court and the United States trustee of the necessity under § 333 to appoint an ombudsman to represent the interests of the patients of the health care business. These amendments also implement the 2005 amendments to the Code. A new checkbox also is provided for a "clearing bank," which may become a debtor upon the filing of a petition at the direction of the Board of Governors of the Federal Reserve System; this addition conforms to an amendment to § 109(b)(2) of the Code which was enacted in 2000.

October 2006 Supplement to Committee Note

The section of the form labeled "Information Regarding Debtor" is amended to facilitate, to the extent available in an involuntary case, the collection of the same statistical information that is requested in a voluntary case. Accordingly, information about whether the debtor is an individual, a corporation, or some other type of entity is separated from the checklist of types of debtors, such as health care businesses and railroads, concerning which the Code provides for specialized treatment.

Form 6-Summary
(10/06)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____

Debtor

Chapter _____

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			$		
B - Personal Property			$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$	
F - Creditors Holding Unsecured Nonpriority Claims				$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$	$	

Form 6-Summ2
(10/06)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

☐ Check this box if you are an individual debtor whose debts are NOT primarily consumer debts and, therefore, are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	Amount
Domestic Support Obligations (from Schedule E)	$
Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E) (whether disputed or undisputed)	$
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E)	$
Student Loan Obligations (from Schedule F)	$
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E	$
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$
TOTAL	$

State the following:

Average Income (from Schedule I, Line 16)	$
Average Expenses (from Schedule J, Line 18)	$
Current Monthly Income (from Form 22A Line 12; **OR**, Form 22B Line 11; **OR**, Form 22C Line 20)	$

State the following:

1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column		$
2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column.	$	
3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column		$
4. Total from Schedule F		$
5. Total of non-priority unsecured debt (sum of 1, 3, and 4)		$

Form B6D (10/06)

In re _____, **Case No.** _____

Debtor **(If known)**

SCHEDULE D – CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests.

List creditors in alphabetical order to the extent practicable. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m). If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Total the columns labeled "Amount of Claim Without Deducting Value of Collateral" and "Unsecured Portion, if Any" in the boxes labeled "Total(s)" on the last sheet of the completed schedule. Report the total from the column labeled "Amount of Claim Without Deducting Value of Collateral" also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report the total from the column labeled "Unsecured Portion, if Any" on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (*See Instructions Above*)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
____ continuation sheets attached			Subtotal ► (Total of this page)				$	$
			Total ► (Use only on last page)				$	$
							(Report also on Summary of Schedules.)	(If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

Form B6D – Cont.
(10/06)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE D – CREDITORS HOLDING SECURED CLAIMS
(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (*See Instructions Above*)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
Sheet no.___of___continuation sheets attached to Schedule of Creditors Holding Secured Claims			Subtotal (s)▶ (Total(s) of this page)				$	$
			Total(s) ▶ (Use only on last page)				$ (Report also on Summary of Schedules.)	$ (If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

Form B6E
(10/06)

In re _____, Case No._____
Debtor (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name, mailing address, including zip code, and last four digits of the account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition. Use a separate continuation sheet for each type of priority and label each with the type of priority.

The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W,""J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

Report the total of amounts entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts who file a case under chapter 7 or 13 report this total also on the Statistical Summary of Certain Liabilities and Related Data.

Report the total of amounts not entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts not entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts who file a case under chapter 7 report this total also on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Domestic Support Obligations**

Claims for domestic support that are owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such a child, or a governmental unit to whom such a domestic support claim has been assigned to the extent provided in 11 U.S.C. § 507(a)(1).

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(3).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $10,000* per person earned within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(5).

In re _____, Case No._____
Debtor (if known)

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,925* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(6).

☐ **Deposits by individuals**

Claims of individuals up to $2,225* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

☐ **Claims for Death or Personal Injury While Debtor Was Intoxicated**

Claims for death or personal injury resulting from the operation of a motor vehicle or vessel while the debtor was intoxicated from using alcohol, a drug, or another substance. 11 U.S.C. § 507(a)(10).

* Amounts are subject to adjustment on April 1, 2007, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

Form B6E Contd.
(10/06)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

(Continuation Sheet)

Type of Priority for Claims Listed on This Sheet

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM	AMOUNT ENTITLED TO PRIORITY	AMOUNT NOT ENTITLED TO PRIORITY, IF ANY
Account No.									
Account No.									
Account No.									
Account No.									
Sheet no. ___ of ___ sheets attached to Schedule of Creditors Holding Priority Claims — Subtotals➤ (Totals of this page)							$	$	
Total➤ (Use only on last page of the completed Schedule E. Report also on the Summary of Schedules.)							$		
Totals➤ (Use only on last page of the completed Schedule E. If applicable, report also on the Statistical Summary of Certain Liabilities and Related Data.)								$	$

Form B6F (10/06)

In re _____, **Case No.** _____

Debtor **(If known)**

SCHEDULE F- CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts filing a case under chapter 7, report this total also on the Statistical Summary of Certain Liabilities and Related Data..

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
						Subtotal➤	$
_____continuation sheets attached						Total➤ (Use only on last page of the completed Schedule F.) (Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.)	$

Form B6F Contd.
(10/06)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

Sheet no.___of___sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal➤ $

Total➤ $
(Use only on last page of the completed Schedule F.)
(Report also on Summary of Schedules and, if applicable on the Statistical Summary of Certain Liabilities and Related Data.)

Form B6I
(10/06)

In re _____, Case No. _____
Debtor (if known)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Do not state the name of any minor child.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP:	AGE:

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

INCOME: (Estimate of average or projected monthly income at time case filed)	DEBTOR	SPOUSE
1. Monthly gross wages, salary, and commissions (Prorate if not paid monthly.)	$_____	$_____
2. Estimate monthly overtime	$_____	$_____
3. SUBTOTAL	$_____	$_____
4. LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$_____	$_____
b. Insurance	$_____	$_____
c. Union dues	$_____	$_____
d. Other (Specify): _____	$_____	$_____
5. SUBTOTAL OF PAYROLL DEDUCTIONS	$_____	$_____
6. TOTAL NET MONTHLY TAKE HOME PAY	$_____	$_____
7. Regular income from operation of business or profession or farm. (Attach detailed statement)	$_____	$_____
8. Income from real property	$_____	$_____
9. Interest and dividends	$_____	$_____
10. Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$_____	$_____
11. Social security or government assistance (Specify): _____	$_____	$_____
12. Pension or retirement income	$_____	$_____
13. Other monthly income (Specify): _____	$_____	$_____
14. SUBTOTAL OF LINES 7 THROUGH 13	$_____	$_____
15. AVERAGE MONTHLY INCOME (Add amounts shown on lines 6 and 14)	$_____	$_____
16. COMBINED AVERAGE MONTHLY INCOME: (Combine column totals from line 15; if there is only one debtor repeat total reported on line 15.)	$_____	

(Report also on Summary of Schedules and, if applicable, on Statistical Summary of Certain Liabilities and Related Data.)

17. Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:

_____

_____

Form B6J
(10/06)

In re _____, Case No. _____
Debtor (if known)

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average or projected monthly expenses of the debtor and the debtor's family at time case filed. Prorate any payments made bi-weekly, quarterly, semi-annually, or annually to show monthly rate.

☐ Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse."

1. Rent or home mortgage payment (include lot rented for mobile home) $ _____
   a. Are real estate taxes included? Yes _____ No _____
   b. Is property insurance included? Yes _____ No _____
2. Utilities: a. Electricity and heating fuel $ _____
   b. Water and sewer $ _____
   c. Telephone $ _____
   d. Other _____ $ _____
3. Home maintenance (repairs and upkeep) $ _____
4. Food $ _____
5. Clothing $ _____
6. Laundry and dry cleaning $ _____
7. Medical and dental expenses $ _____
8. Transportation (not including car payments) $ _____
9. Recreation, clubs and entertainment, newspapers, magazines, etc. $ _____
10. Charitable contributions $ _____
11. Insurance (not deducted from wages or included in home mortgage payments)
   a. Homeowner's or renter's $ _____
   b. Life $ _____
   c. Health $ _____
   d. Auto $ _____
   e. Other _____ $ _____
12. Taxes (not deducted from wages or included in home mortgage payments)
(Specify) _____ $ _____
13. Installment payments: (In chapter 11, 12, and 13 cases, do not list payments to be included in the plan)
   a. Auto $ _____
   b. Other _____ $ _____
   c. Other _____ $ _____
14. Alimony, maintenance, and support paid to others $ _____
15. Payments for support of additional dependents not living at your home $ _____
16. Regular expenses from operation of business, profession, or farm (attach detailed statement) $ _____
17. Other _____ $ _____
18. AVERAGE MONTHLY EXPENSES (Total lines 1-17. Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.) $ _____
19. Describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document:
_____
20. STATEMENT OF MONTHLY NET INCOME
   a. Average monthly income from Line 15 of Schedule I $ _____
   b. Average monthly expenses from Line 18 above $ _____
   c. Monthly net income (a. minus b.) $ _____

Official Form 6-Decl.
(10/06)

In re _____ , Case No. _____

Debtor (If known)

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ (Total shown on summary page plus 2.) sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date _____ Signature: _____
Debtor

Date _____ Signature: _____
(Joint Debtor, if any)

[If joint case, both spouses must sign.]

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h) and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.
(Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs this document.

_____

_____
Address

X _____ _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, the _____ [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the _____ [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information, and belief. (Total shown on summary page plus 1.)

Date _____

Signature: _____

_____
[Print or type name of individual signing on behalf of debtor.]

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

Penalty for making a false statement or concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The forms of the Schedules of Assets and Liabilities are amended to implement the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23, (April 20, 2005). An amendment that directs the debtor to avoid disclosing the name of any minor child occurs in several of the schedules in conformity with § 112 which was added to the Code in 2005. Section 112 provides for the debtor to provide the name of any minor child confidentially to the court, should the trustee need the information to evaluate properly the information filed by the debtor.

The "Statistical Summary of Certain Liabilities" is added to collect information needed to prepare statistical reports required under 28 U.S.C. § 159, which was enacted as part of the 2005 Act.

Schedules A, B, C, and D are amended to delete the word "market" from the columns in which the debtor reports the value of various kinds of property. Amendments to § 506 of the Code enacted in 2005 specify that "replacement value" must be used in connection with certain property. The schedules no longer specify "market" value and permit the debtor to choose the appropriate one, whether that be replacement, market, or some other value. Valuation of property, generally, is the subject of extensive provisions in the Code, and the deletion of the word "market" from the determinations of value to be made by the debtor on the schedules is intended to remove any inference about choice of valuation standard. This deletion simply indicates that the form takes no position on which Code provision or valuation standard may be applicable in any instance.

The following paragraphs describe changes that are specific to each schedule.

Schedule B - Personal Property is amended to require the debtor to list any interests in an education IRA, as § 541(b)(5), added to the Code in 2005, makes special provision for them. The schedule also is amended to require the debtor to disclose the existence of any customer lists or other compilations containing personally identifiable information provided by an individual to the debtor in connection with obtaining a product or service from the debtor for personal, family, or household purposes. This amendment implements § 332, which was added to the Code in 2005.

Schedule C - Property Claimed as Exempt is amended to delete descriptive information concerning the length of domicile required for the debtor to qualify to claim certain exemptions. Any summary of the amendments enacted in 2005 to § 522 of the Code concerning these requirements might inadvertently cause the debtor to lose important rights. Accordingly, the

form now directs the debtor to indicate whether exemptions are being claimed under § 522(b)(2) or § 522(b)(3) and whether the debtor claims a homestead exemption that exceeds $125,000.

Schedule E - Creditors Holding Unsecured Priority Claims is amended to implement the changes in priority to which a claim may be entitled under 11 U.S.C. § 507 as amended by the 2005 Act and to add the new priority included in the Reform Act for claims for death or personal injury while the debtor was intoxicated. "Subtotal" and "Total" boxes have been added to the column labeled "Amount Entitled to Priority" to assist the individual debtor to complete the Means Test form.

Schedule G - Executory Contracts and Unexpired Leases is amended by deleting the note to the debtor advising that parties listed on this schedule may not receive notice of the filing of the bankruptcy case unless they also are listed on one of the schedules of liabilities. The better practice is for all parties to transactions with the debtor to receive notice of the filing of the case, and an amendment to Rule 1007 requiring the debtor to provide a mailing list that includes these parties is scheduled to take effect December 1, 2005.

Schedule H - Codebtors is amended to add specifics about community property jurisdictions in connection with the requirement to provide the name of any spouse of a debtor who resides or resided in a community property jurisdiction. This amendment also mirrors amendments made in 1997 to Official Form 7, the Statement of Financial Affairs, and will assure that these codebtors receive notice of the filing of the bankruptcy case. The form also is amended to extend from six years to eight years the time period for which this information is reported pursuant to the 2005 amendments to § 727(a)(8) of the Code.

Schedule I - Current Income of Individual Debtor(s) is amended to require the income of a nondebtor spouse to be reported in cases filed under chapters 7 and 11. Line numbers have been added to assist the debtor in calculating and reporting totals. A new subtotal line for income from sources other than as an employee and a new "total monthly income" line provide for this form to be used in conjunction with Schedule J to satisfy the requirements of § 521(a)(1)(B)(v), which was added to the Code in 2005. The form also has been revised to provide the statement concerning any anticipated increase or decrease in income required in § 521(a)(1)(B)(vi), which also was added to the Code in 2005.

Schedule J - Current Expenditures of Individual Debtor(s). A direction has been added to require the debtor to report any increase or decrease in expenses anticipated to occur within the year following the filing of the document, as required by § 521(a)(1)(B)(vi), which was added to the Code in 2005. The form also is amended to provide, in conjunction with Schedule I, a statement of monthly net income, itemized to show how the amount is calculated, as required by § 522(a)(1)(B)(v), which was added to the Code in 2005.

Declaration Concerning Debtor's Schedules. The declaration by a non-attorney bankruptcy petition preparer is amended to include material mandated by § 110 of the Code as amended in 2005.

October 2006 Supplement to Committee Note

In order to comply fully with the statistical reporting requirements of 28 U.S.C. §159, which was enacted as part of the 2005 Act and takes effect in October 2006, the "Statistical Summary of Certain Liabilities" is renamed "Statistical Summary of Certain Liabilities and Related Data," and additional information is required to be stated there. Collecting in one place the bulk of the information to be used in the reports required under 28 U.S.C. § 159 will assist the courts and the Director of the Administrative Office of the United States Courts to fulfill their statutory responsibilties.

Schedule D is amended to provide for creating a total of any unsecured amounts (amounts that exceed the value of the collateral) owed to creditors holding secured claims, and for stating this amount on the Statistical Summary of Certain Liabilities and Related Data. Schedule E is amended to provide for creating totals of the amounts entitled to priority and of any amounts that exceed the statutory limits on certain priorities and to direct the debtor to report these amounts on the Statistical Summary of Certain Liabilities and Related Data. Schedule F is amended to direct the debtor to report the total of this schedule both on the Summary of Schedules and on the Statistical Summary of Certain Liabilities.

The statistical reports required under 28 U.S.C. § 159 must include "the current monthly income, average income, and average expenses" of individual debtors with primarily consumer debts as reported on the schedules filed by those debtors. Accordingly, Schedules I and J, on which debtors already are directed to report average income and average expenses are amended to label the totals arrived at by completing the schedules as "average monthly income" and "average monthly expenses." These amendments make no substantive changes, simply conforming the terminology on these schedules to that used in § 159.

The amount of the debtor's current monthly income, which also is required by § 159, is derived from Official Forms 22A, 22B, or 22C, depending on the chapter under which the debtor files. This amount is included on the Statistical Summary of Certain Liabilities and Related Data as a convenience to make reports under § 159 easier to compile.

The Declaration Concerning Debtor's Schedules is amended in the section designated for signing and verifying by an individual or joint debtor. The amendment accommodates the requirement that individual debtors must complete both the Summary of Schedules and the Statistical Summary of Certain Liabilities and Related Data by directing the debtor to state number of pages being verified as the number of sheets in the completed schedules "plus 2."

FORM B9G (Chapter 12 Individual or Joint Debtor Family Farmer or Family Fisherman (10/06))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security No./Complete EIN or other Taxpayer ID No.:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9G (10/06)

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9H (Chapter 12 Corporation/Partnership Family Farmer or Family Fisherman (10/06)

UNITED STATES BANKRUPTCY COURT _____ **District of** _____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number:\ Last four digits of Social Security No./Complete EIN or other Taxpayer ID No.:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____ Time:_____ Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS **Form B9H (10/06)**

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9I (Chapter 13 Case (10/06)

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security No./Complete EIN or other Taxpayer ID No.:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):
:

For a governmental unit (except as otherwise provided in Fed. R. Bankr. P. 3002 (c)(1)):

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2) or (4), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

The form is amended in a variety of way to implement the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005). All versions of the form are amended to advise creditors to consult an attorney concerning what rights they may have in the specific case. All versions of the form are also amended to provide information to creditors with foreign addresses about filing claims and to advise those creditors to consult a lawyer familiar with United States bankruptcy law regarding any questions they may have about their rights in a particular case. These amendments implement § 1514, which was added to the Code in 2005.

Forms 9A and 9C are amended to include a box in which the clerk can notify creditors in a chapter 7 case filed by an individual with primarily consumer debts whether the presumption of abuse has arisen under § 707(b) of the Code as amended in 2005. Under § 342(d) of the Code, the clerk has a duty to notify creditors concerning the presumption within ten days of the filing of the petition. In cases in which the debtor does not file Official Form 22A with the petition, the forms provide for the clerk to state that insufficient information has been filed, and to inform creditors that if later-filed information indicates that the presumption arises, creditors will be sent another notice.

In cases involving serial filers (debtors who have filed more than one case within a specified period), the automatic stay provided by § 362(a) of the Code as amended in 2005 may not apply or may be limited in duration, unless the stay is extended or imposed by court order. The form contains a general statement alerting debtors to this possibility.

Section 1514, added to the Code in 2005, also requires that a secured creditor with a foreign address be advised whether the creditor is required to file a proof of claim, and Forms 9B, 9D, 9E, 9E (Alt.), 9F, 9F (Alt.), 9G, 9H, and 9I are amended to include general information addressing that question. Forms 9E, 9E (Alt.), 9F, and 9F (Alt.)also are amended to inform creditors that in a case in which the debtor has filed a plan for which it has solicited acceptances before filing the case, the court may, after notice and a hearing, order that the United States trustee not convene a meeting of creditors.

Forms 9E and 9E (Alt.) are amended to state that, unless the court orders otherwise, an individual chapter 11 debtor's discharge is not effective until completion of all payments under the plan, as provided in § 1141(d)(5) which was added to the Code in 2005. Forms 9F and 9F (Alt.) are amended to include a deadline to file a complaint to determine the dischargeability of a debt, in conformity with § 1141(d)(6) which was added to the Code in 2005.

Form 9I is amended to include a deadline to file a complaint to determine the dischargeability of certain debts. This amendment implements a 2005 amendment to § 1328(a) of the Code.

October 2006 Supplement to Committee Note

Forms 9G and 9H are amended to add "family fisherman" to the title and to the description of chapter 12. The 2005 amendments to the Code added a "family fisherman," as defined in § 101(19A), to the persons eligible to file a bankruptcy case under chapter 12. Form 9I is amended to provide general notice to parties in interest of the potential for a claim to be filed late in the case.

Form B22A (Chapter 7) (10/06)
In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The presumption arises.**
☐ **The presumption does not arise.**
(Check the box as directed in Parts I, III, and VI of this statement.)

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedule I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1. If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

☐ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2. **Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed.
   a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.**
   b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.**
   c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.**
   d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the business expenses entered Line b as a deduction in Part V.**	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.**	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include amounts paid by the debtor's spouse if Column B is completed.	$	$

a.	Gross receipts	$
b.	Ordinary and necessary business expenses	$
c.	Business income	Subtract Line b from Line a

a.	Gross receipts	$
b.	Ordinary and necessary operating expenses	$
c.	Rent and other real property income	Subtract Line b from Line a

9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act | Debtor $ _____ | Spouse $ _____	$	$
10	**Income from all other sources.** If necessary, list additional sources on a separate page. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. a. | $ b. | $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	$	

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
20A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

Local Standards: housing and utilities; mortgage/rent expense. Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.**

20B

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

$

Local Standards: housing and utilities; adjustment. if you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

21

_____

_____

_____ $

Local Standards: transportation; vehicle operation/public transportation expense. You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

22

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8.

☐ 0 ☐ 1 ☐ 2 or more.

Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) $

Local Standards: transportation ownership/lease expense; Vehicle 1. Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

☐ 1 ☐ 2 or more.

23

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, First Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

$

Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 23.

24

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, Second Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

$

25 **Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

26 **Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.** $

27	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 44.**	$
29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service—such as cell phones, pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Expense Deductions under § 707(b)

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total: Add Lines a, b and c	$
35	**Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	$
36	**Protection against family violence.** Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
37	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$
38	**Education expenses for dependent children less than 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
39	**Additional food and clothing expense.** Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$
40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40	$

Subpart C: Deductions for Debt Payment

42 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

43 **Other payments on secured claims.** If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44 **Payments on priority claims.** Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $

45 **Chapter 13 administrative expenses.** If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

46 **Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45. $

Subpart D: Total Deductions Allowed under § 707(b)(2)

47 **Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 33, 41, and 46. $

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$

52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $6,000** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $10,000.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $6,000, but not more than $10,000.** Complete the remainder of Part VI (Lines 53 through 55).
53	**Enter the amount of your total non-priority unsecured debt** $
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result. $
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.

Part VII: ADDITIONAL EXPENSE CLAIMS

56 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

Part VIII: VERIFICATION

57 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Form B22C (Chapter 13) (10/06)

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

		Column A Debtor's Income	Column B Spouse's Income
1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.		
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include amounts paid by the debtor's spouse.	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act: Debtor $ _____ Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD

12	**Enter the amount from Line 11.**	
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. Otherwise, enter zero.	
14	**Subtract Line 13 from Line 12 and enter the result.**	
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

18	**Enter the amount from Line 11.**	$
19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. If you are unmarried or married and filing jointly with your spouse, enter zero.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

24	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

25B **Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rent Expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

$

26 **Local Standards: housing and utilities; adjustment.** if you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____

_____

_____

$

27 **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more.

Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

$

28 **Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, First Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

$

29 **Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, Second Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

$

30 **Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

$

31 **Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.**

$

32	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	
35	**Other Necessary Expenses: childcare.** Enter the average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service—such as cell phones, pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Expense Deductions under § 707(b)

Note: Do not include any expenses that you have listed in Lines 24-37

39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total: Add Lines a, b, and c	$
40	**Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**	$
41	**Protection against family violence.** Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
42	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$
43	**Education expenses for dependent children under 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$
44	**Additional food and clothing expense.** Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**	$
45	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.	$

Subpart C: Deductions for Debt Payment

47 Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

$

48 Other payments on secured claims. If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

$

49 Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $

50 Chapter 13 administrative expenses. Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

51 Total Deductions for Debt Payment. Enter the total of Lines 47 through 50. $

Subpart D: Total Deductions Allowed under § 707(b)(2)

52 Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 38, 46, and 51. $

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53 Total current monthly income. Enter the amount from Line 20. $

54 Support income. Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child. $

55 Qualified retirement deductions. Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19). $

56 Total of all deductions allowed under § 707(b)(2). Enter the amount from Line 52. $

57 Total adjustments to determine disposable income. Add the amounts on Lines 54, 55, and 56 and enter the result. $

58	**Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 57 from Line 53 and enter the result.	$

Part VI: ADDITIONAL EXPENSE CLAIMS

59 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

Part VII: VERIFICATION

60 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Each form provides for reporting income items constituting CMI. The items are reported in a set of entry lines—Part II of the Chapter 7 form and Part I of the forms for Chapter 11 and Chapter 13—that include separate columns for reporting income of the debtor and of the debtor's spouse. The first of these entry lines includes a set of instructions and check boxes indicating when the "debtor's spouse" column must be completed. The instructions also direct the required averaging of reported income.

The subsequent entry lines specify several common types of income and are followed by a "catch-all" line for other income. The specific entry lines address: (a) gross wages; (b) business income; (c) rental income; (d) interest, dividends, and royalties; (e) pension and retirement income; (f) regular contributions to the debtor's household expenses; and (g) unemployment compensation. Gross wages (before taxes) are required to be entered. Consistent with usage in the Internal Revenue Manual and the American Community Survey of the Census Bureau, business and rental income is defined as gross receipts less ordinary and necessary expenses. Unemployment compensation is given special treatment. Because the federal government provides funding for state unemployment compensation under the Social Security Act, there may be a dispute about whether unemployment compensation is a "benefit received under the Social Security Act." The forms take no position on the merits of this argument, but give debtors the option of reporting unemployment compensation separately from the CMI calculation. This separate reporting allows parties in interest to determine the materiality of an exclusion of unemployment compensation and to challenge it. The forms provide for totaling the income lines.

C. The means test: deductions from current monthly income (CMI)

The means test operates by deducting from CMI defined allowances for living expenses and payment of secured and priority debt, leaving disposable income presumptively available to pay unsecured non-priority debt. These deductions from CMI under are set out in the Code at § 707(b)(2)(A)(ii)-(iv). The forms for Chapter 7 and Chapter 13 have identical sections (Parts V and III, respectively) for calculating these deductions. The calculations are divided into subparts reflecting three different kinds of allowed deductions.

1. Deductions under IRS standards

Subpart A deals with deductions from CMI, set out in § 707(b)(2)(A)(ii), for "the debtor's applicable monthly expense amounts specified under the National

Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." The forms provide entry lines for each of the specified expense deductions under the IRS standards, and instructions on the entry lines identify the website of the U.S. Trustee Program, where the relevant IRS allowances can be found. As with all of the deductions in § 707(b)(2)(A)(ii), deductions under the IRS standards are subject to the proviso that they not include "any payments for debts."

The IRS National Standards provide a single allowance for food, clothing, household supplies, personal care, and miscellany, depending on income and household size. The forms contain an entry line for the applicable allowance.

The IRS Local Standards provide one set of deductions for housing and utilities and another set for transportation expenses, with different amounts for different areas of the country, depending on the size of the debtor's family and the number of the debtor's vehicles. Each amount specified in the Local Standards is treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii) provides for deductions in the "amounts specified under the . . . Local Standards," the forms treat these amounts as allowed deductions. The forms again direct debtors to the website of the U.S. Trustee Program to obtain the appropriate allowances.

The Local Standards for housing and utilities, as published by the IRS for its internal purposes, present single amounts covering all housing expenses; however, for bankruptcy purposes, the IRS has separated these amounts into a non-mortgage component and a mortgage/rent component. The non-mortgage component covers a variety of expenses involved in maintaining a residence, such as utilities, repairs and maintenance. The mortgage/rent component covers the cost of acquiring the residence. For homeowners with mortgages, the mortgage/rent component involves debt payment, since the cost of a mortgage is part of the allowance. Accordingly, the forms require debtors to deduct from the mortgage/rent component their average monthly mortgage payment (including required payments for taxes and insurance), up to the full amount of the IRS mortgage/rent component, and instruct debtors that this average monthly payment is the one reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii). The forms allow debtors to challenge the appropriateness of this method of computing the Local Standards allowance for housing and utilities and to claim any additional housing allowance to which they contend they are entitled, but the forms require specification of the basis for such a contention.

The IRS issues Local Standards for transportation in two components for its internal purposes as well as for bankruptcy: one component covers vehicle operation/public transportation expense and the other ownership/lease expense. The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates, with debtors who do not operate vehicles being given a public transportation allowance. The instruction for this line item makes it clear that every debtor is thus entitled to some transportation expense allowance. No debt payment is involved in this allowance. The ownership/lease component, on the other hand, may involve debt payment. Accordingly, the forms require debtors to reduce the allowance for ownership/lease expense by the average monthly loan payment amount (principal and interest), up to the full amount of the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii).

The IRS does not set out specific dollar allowances for "Other Necessary Expenses." Rather, it specifies a number of categories for such expenses, and describes the nature of the expenses that may be deducted in each of these categories. Section 707(b)(2)(a)(ii) allows a deduction for the debtor's actual expenses in these specified categories, subject to its requirement that payment of debt not be included. Several of the IRS categories deal with debt repayment and so are not included in the forms. Several other categories deal with expense items that are more expansively addressed by specific statutory allowances. Subpart A sets out the remaining categories of "Other Necessary Expenses" in individual entry lines. Instructions in these entry lines reflect limitations imposed by the IRS and the need to avoid inclusion of items deducted elsewhere on the forms.

Subpart A concludes with a subtotal of the deductions allowed under the IRS standards.

2. Additional statutory expense deductions

In addition to the expense deductions allowed under the IRS standards, the means test makes provision—in subclauses (I), (II), (IV), and (V) of § 707(b)(2)(A)(ii)—for six special expense deductions. Each of these additional expense items is set out on a separate entry line in Subpart B, introduced by an instruction that there should not be double counting of any expense already included in the IRS deductions. Contributions to tax-exempt charities provide another statutory expense deduction. Section 1325(b)(2)(A)(ii) expressly allows a deduction from CMI for such contributions (up to 15% of the debtor's gross income), and § 707(b)(1) provides that in considering whether a Chapter 7 filing is an abuse, the court may not take into consideration "whether a debtor . . .

continues to make [tax-exempt] charitable contributions." Accordingly, Subpart B also includes an entry line for charitable contributions. The subpart concludes with a subtotal of the additional statutory expense deductions.

3. Deductions for payment of debt

Subpart C deals with the means test's deductions from CMI for payment of secured and priority debt, as well as a deduction for administrative fees that would be incurred if the debtor paid debts through a Chapter 13 plan. In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines—one for payments that are contractually due during the 60 months following the bankruptcy filing, the other for amounts needed to retain necessary collateral securing debts in default. In each situation, the instructions for the entry lines require dividing the total payment amount by 60, as the statute directs. Priority debt, deductible pursuant to § 707(b)(2)(A)(iv), is treated on a single entry line, also requiring division by 60. The defined deduction for the expenses of administering a Chapter 13 plan is allowed by § 707(b)(2)(A)(ii)(III) only for debtors eligible for Chapter 13. The forms treat this deduction in an entry line requiring the eligible debtor to state the amount of the prospective Chapter 13 plan payment and multiply that payment amount by the percentage fee established for the debtor's district by the Executive Office for United States Trustees. The forms refer debtors to the website of the U.S. Trustee Program to obtain this percentage fee. The subpart concludes with a subtotal of debt payment deductions.

4. Total deductions

Finally, the forms direct that the subtotals from Subparts A, B, and C be added together to arrive at the total of allowed deductions from CMI under the means test.

5. Additional claimed deductions

The forms do not provide for means-test deductions from CMI for expenses in categories that are not specifically identified as "Other Necessary Expenses" in the Internal Revenue Manual. However, debtors may wish to claim expenses that do not fall within the categories listed as "Other Necessary Expenses" in the forms. Part VII of the Chapter 7 form and Part VI of the Chapter 13 form provide for such expenses to be identified and totaled. Although expenses listed in these sections are not deducted from CMI for purposes of the means-test calculation, the listing provides a basis for debtors to assert that these expenses should be deducted from CMI under § 707(b)(2)(A)(ii)(I), and that the results of the forms' calculation, therefore, should be modified.

D. The chapter-specific forms

1. Chapter 7

The Chapter 7 form has several unique aspects. The form includes, in the upper right corner of the first page, a check box directing the debtor to state whether or not the calculations required by the form result in a presumption of abuse. The debtor is not bound by this statement and may argue, in response to a motion brought under § 707(b)(1), that there should be no presumption despite the calculations required by the form. The check box is intended to give clerks of court a conspicuous indication of the cases for which they are required to provide notice of a presumption of abuse pursuant to § 342(d).

Part I implements the provision of § 707(b)(2)(D) that excludes certain disabled veterans from all means-testing, making it unnecessary to compute the CMI of such veterans. Debtors who declare under penalty of perjury that they are disabled veterans within the statutory definition are directed to verify their declaration in Part VII, to check the "no presumption" box at the beginning of the form, and to disregard the remaining parts of the form.

Part II computes CMI. Section 707(b)(7) prohibits a motion to dismiss based on the means test's presumption of abuse if the debtor's annualized CMI does not exceed a defined median state income. For this purpose, the statute directs that CMI of the debtor's spouse be combined with the debtor's CMI even if the debtor's spouse is not a joint debtor, unless the debtor declares under penalty of perjury that the spouses are legally separated or living separately other than for purposes of evading the means test. Accordingly, the calculation of CMI in Part II directs a computation of the CMI of the debtor's spouse not only in joint cases, but also in cases of married debtors who do not make the specified declaration, and the CMI of both spouses in these cases is combined for purposes of determining standing under § 707(b)(7).

Part III compares the debtor's CMI to the applicable state median income for purposes of § 707(b)(7). It then directs debtors whose income does not exceed the applicable median to verify the form, to check the "no presumption" box at the beginning of the form, and not to complete the remaining parts of the form. Debtors whose CMI does exceed the applicable state median are required to complete the remaining parts of the form.

Part IV adjusts the CMI of a married debtor, not filing jointly, whose spouse's CMI was combined with the debtor's for purposes of determining standing to assert the means-test presumption. The means test itself does not

charge a married debtor in a non-joint case with the income of the non-filing spouse, but rather only with contributions made by that spouse to the household expenses of the debtor or the debtor's dependents, as provided in the definition of CMI in § 101(10A). Accordingly, Part IV calls for the combined CMI of Part II to be reduced by the amount of the non-filing spouse's income that was not contributed to the household expenses of the debtor or the debtor's dependents.

Part V provides for a calculation of the means test's deductions from the debtor's CMI, as described above.

Part VI provides for a determination of whether the debtor's CMI, less the allowed deductions, gives rise to a presumption of abuse under § 707(b)(2)(A). Depending on the outcome of this determination, the debtor is directed to check the appropriate box at the beginning of the form and to sign the verification in Part VIII. Part VII allows the debtor to claim additional deductions, as discussed above.

2. Chapter 11

The Chapter 11 form is the simplest of the three, since the means-test deductions of § 707(b)(2) are not employed in determining the extent of an individual Chapter 11 debtor's disposable income. Section 1129(a)(15) requires payments of disposable income "as defined in section 1325(b)(2)," and that paragraph allows calculation of disposable income under judicially-determined standards, rather than pursuant to the means-test deductions, specified for higher income Chapter 13 debtors by § 1325(b)(3). However, § 1325(b)(2) does require that CMI be used as the starting point in the judicial determination of disposable income, and so the Chapter 11 form requires this calculation (in Part I of the form), as described above, together with a verification (in Part II).

3. Chapter 13

Like the Chapter 7 form, the form for Chapter 13 debtors contains a number of special provisions. The upper right corner of the first page includes check boxes requiring the debtor to state whether, under the calculations required by the statement, the applicable commitment period under § 1325(b)(4) is three years or five years and whether § 1325(b)(3) requires the means-test deductions to be used in determining the debtor's disposable income. The check box is intended to inform standing trustees and other interested parties about these items, but does not prevent the debtor from arguing that the calculations required by the form do not accurately reflect the debtor's disposable income.

Part I is a report of income to be used for determining CMI. Section 1325(b)(4) imposes a five-year applicable commitment period—rather than a three-year period—if the debtor's annualized CMI is not less than a defined median state income. For this purpose, as under § 707(b)(4), the statute requires that the CMI of the debtor's spouse to be combined with the debtor's CMI, and no exception exists for spouses who are legally separated or living separately. Accordingly, the report of income in Part I directs a combined reporting of the income of both spouses in all cases of married debtors.

Part II computes the applicable commitment period by annualizing the income calculated in Part I and comparing it to the applicable state median. The form allows debtors to contend that the income of a non-filing spouse should not be treated as CMI and permits debtors to claim a deduction for any income of a non-filing spouse to the extent that this income was not contributed to the household expenses of the debtor or the debtor's dependents. The debtor is directed to check the appropriate box at the beginning of the form, stating the applicable commitment period.

Part III compares the debtor's CMI to the applicable state median, allowing a determination of whether the means-test deductions must be used, pursuant to § 1325(b)(3), in calculating disposable income. For this purpose, since § 1325(b)(3) does not provide for including the income of the debtor's spouse, the form directs a deduction of the income of a non-filing spouse that is not contributed to the household expenses of the debtor or the debtor's dependents. Again, the debtor is directed to check the appropriate box at the beginning of the form, indicating whether the means-test deductions are applicable. If so, the debtor is directed to complete the remainder of the form. If not, the debtor is directed to complete the verification in Part VII but not complete the other parts of the form.

Part IV provides for calculation of the means-test deductions provided in § 707(b)(2), described above, as incorporated by § 1325(b)(3) for debtors with CMI above the applicable state median.

Part V provides for three adjustments required by special provisions affecting disposable income in Chapter 13. First, § 1325(b)(2) itself excludes from the CMI used in determining disposable income certain "child support payments, foster care payments, [and] disability payments for a dependent child." Because payments of this kind are included in the definition of CMI in § 101(10A), a line entry for deduction of these payments is provided. Second, a line entry is provided for deduction of contributions by the debtor to certain retirement plans, listed in § 541(b)(7)(B), since that provision states that such contributions "shall not constitute disposable income, as defined in section 1325(b)." Third, the same line

entry also allows a deduction from disposable income for payments on loans from retirement accounts that are excepted from the automatic stay by § 362(b)(19), since § 1322(f) provides that for a "loan described in section 362(b)(19) . . . any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. No specific statutory allowance for such a deduction exists, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

Part VI allows the debtor to claim additional deductions, as described above, and Part VII is the verification.

October 2006 Supplement to Committee Note

Forms 22A, Line 43, and Form 22C, Line 48, are amended to delete the phrase "in default" with respect to "Other payments on secured claims." A debtor may be required to make other payments to the creditor even when the debt is not in default, such as to retain collateral. Form 22C, Line 17, also is amended to require all chapter 13 debtors, including those whose income falls below the applicable median income, to determine their disposable income under § 1325(b)(3) of the Code by completing Part III of the form. All three forms contain stylistic amendments to conform the wording more closely to that used in the 2005 Act.

Form 23
(10/06)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7 or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date), I completed an instructional course in personal financial management provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. :_____.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of *[Check the appropriate box.]*:

☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h);
☐ Active military duty in a military combat zone; or
☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The form is new. Sections 727(a)(11) and 1328(g)(1), which were added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), require the debtor to complete an instructional course concerning personal financial management as a condition for receiving a discharge. The completed form, when filed by the debtor, will signal the clerk that this condition has been satisfied.

October 2006 Supplement to Committee Note

The form is amended to direct each individual debtor, including both spouses in a joint case, to file a separate certification and to provide the certificate number of the certificate of completion issued to the debtor by the approved personal financial management counselor. The form also is amended to include the deadlines for filing the certification in cases under chapters 7 and 13 and to instruct the debtor that the form is not to be used to file the certificate provided by the debtor's prepetition credit counselor.

PROPOSED AMENDMENTS TO

OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, 24, and

PROPOSED NEW EXHIBIT D TO

OFFICIAL FORMS 1, 25A, 25B, 25C, and 26

D. Proposed Amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and New Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26 Submitted for Publication

The Advisory Committee recommends that the Standing Committee approve the following proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and new proposed Official Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26 for publication for comment.

1. Synopsis of Proposed Amendments.

Proposed amendments to 20 Official Forms and five new Official Forms, which the Advisory Committee requests be published for comment by bench and bar in August 2006, are summarized below. The forms and committee notes follow the summary. The committee notes describe all the changes to the forms – those made when the forms were amended or created in October 2005, those proposed to be made in October 2006, and those proposed only in the version which the Advisory Committee requests be published for comment. Some of the forms which have multiple parts are treated together, under a single form number, while others are treated as separate forms. This different treatment reflects the way each form is used.

(a) Official Form 1, Voluntary Petition –

The changes to the form are related to a new 28 U.S.C. § 159 which was enacted as part of the 2005 Act. Section 159 establishes substantial new statistical reporting requirements concerning bankruptcy cases and has a delayed effective date of October 17, 2006. Most of the proposed amendments to Form 1 will assist the courts in fulfilling these new statistical reporting requirements and improve the quality of the data collected. Requests for information about the debtor have been revised and the statutory definition of "consumer debt" has been added to obtain better information about individuals who incur personal debt to finance their business enterprises. Under § 159, statistical information about the debtor's assets and liabilities must come from the debtor's schedules; accordingly, the estimated dollar amounts and estimated number of creditors on this form have been simplified, as they now will be used primarily for case management purposes.

An important amendment appears on page 2 of the form. "Exhibit D" replaces the section of the form labeled "Certification Concerning Debt Counseling by Individual/Joint Debtor(s)." Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors may not be aware of the requirement to obtain prepetition credit counseling, of the few and very narrow exceptions to that requirement, or of the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. "Exhibit D" instructs individual debtors to attach a completed Exhibit D, which is a separate, two-page document.

(b) Official Form 1, Exhibit D - Individual Debtor's Statement of Compliance with Credit Counseling Requirement -

The separate Exhibit D form contains checkboxes and information about the requirements along with instructions concerning the additional documents that are required in particular circumstances. This format is similar to that of existing Exhibits A and C to Form 1.

(c) Official Form 3A, Application to Pay Filing Fee in Installments -

This form is unchanged from the October 2005 version.

(d) Official Form 3B, Application for Waiver of the Chapter 7 Filing Fee for Individuals Who Cannot Pay the Filing Fee in Full or in Installments -

This form is unchanged from the October 2005 version.

(e) Official Form 4, List of Creditors Holding 20 Largest Unsecured Claims -

The form is amended to provide more detail than the existing cross-reference to Rule 1007(m) concerning notification to a guardian or other appropriate adult when a minor child is a creditor in a bankruptcy case.

(f) Official Form 5, Involuntary Petition -

The changes to the form will facilitate, to the extent possible in an involuntary case, the collection of the same statistical information as a voluntary case.

(g) Official Form 6, Schedules -

Proposed changes in the form to be made in October 2006 have been incorporated in the amendments to be published. In addition, the description of the information to be provided concerning social-security and other taxpayer-identification numbers has been revised in conformity with new rule 9037. The statistical changes include renaming the "Statistical Summary of Certain Liabilities" to "Statistical Summary of Certain Liabilities and Related Data," as additional information is required to be stated there. Schedules D, E, F, I, and J also are amended to facilitate reporting of the required statistical information. Schedules I and J, on which individual debtors report their "current income and current expenditures" are amended to label the totals as "average income" and "average expenses," to conform to the terminology used in § 159. This is a stylistic amendment only, as the instructions on the form already direct the debtor to use averages. The Declaration Concerning Debtor's Schedules is amended in the section designated for an individual debtor's signature to reflect the fact that an individual must complete a two-page summary.

(h) Official Form 7, Statement of Financial Affairs -

The form is amended to conform to new Rule 9037, but is otherwise unchanged.

(i) Official Form 8, Chapter 7 Individual Debtor's Statement of Intention -

The form is unchanged from the October 2005 version.

(j) Official Form 9 - Notice of Commencement of Case, Meeting of Creditors and Deadlines -

The 2005 Act added "family fisherman" to "family farmer" as a category of debtor eligible for bankruptcy relief under chapter 12 of the Bankruptcy Code. The necessity to add "family fisherman" to Forms 9G and 9H, used to notify creditors of the filing of a case under chapter 12, was overlooked when the forms were amended in October 2005. In addition, the 2005 Act provided that the Internal Revenue Service may assert a claim in a chapter 13 case based on a debtor's income tax return filed during the three to five years the case is pending, or well after the normal deadline for filing a proof of claim. Forms 9G, 9H, and 9I are amended to correct these initial oversights.

(k) Official Form 10 - Proof of Claim -

The 2005 Act changed the priority scheme in § 507(a) of the Code which requires conforming amendments to the form. The form also is amended to provide more accurate addresses for the transmittal of payments and notices, as well as to indicate that a particular proof of claim has been replaced. The Instructions and Definitions portions of the form have been updated to conform to the new definitions and requirements adopted by the 2005 amendments.

(l) Official Form B16A - Caption (Full) -

The form is amended to require the disclosure of all names used by the debtor in the past eight years rather than six years. The form also is amended to direct the use of only the last four digits of an individual debtor's taxpayer-identification number.

(m) Official Form 18 - Discharge of Debtor in a Chapter 7 Case -

The form is amended to require the disclosure of all names used by the debtor in the past eight years rather than six years. The form also is amended to direct the use of only the last four digits of an individual debtor's tax-identification number. The explanation portion of the form is also amended to reflect the changes to the Code governing the nondischargeability of certain obligations.

(n) Official Form 19A - Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer-

The form is amended by renaming the former certification as a "declaration" and by adding additional language mandated by the 2005 amendments to § 110 of the Code.

(o) Official Form 19B - Notice to Debtor by Non-Attorney Bankruptcy Petition Preparer-

The form is unchanged from the October 2005 version.

(p) Official Form 21 - Statement of Social-Security Number -

The form is amended to direct debtors who do not have a social-security number to furnish a taxpayer-identification number on the form.

(q) Official Form 22A - Chapter 7 Statement of Current Monthly Income and Means-Test Calculation -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.,* to retain collateral.

(r) Official Form 22B - Chapter 11 Statement of Current Monthly Income -

The form is unchanged from the October 2005 version.

(s) Official Form 22C - Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income -

Throughout the form, stylistic changes have been made so that the language of the form more closely tracks that used in the statute. Line 17 has been amended to require all chapter 13 debtors, including those whose income is below the applicable median, to complete Part III of the form. In addition, on Line 43, the phrase "in default" has been deleted, in recognition that a debtor may be required to make additional payments to a creditor even if the loan is not in default, *e.g.,* to retain collateral.

(t) Official Form 23 - Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management -

The form is amended to require the debtor to state the number of the certificate of completion issued by the personal financial management instructor, provide checkboxes for the debtor to indicate any applicable exception to fulfilling the requirement to undergo instruction, and to state the deadlines for filing the certification in a chapter 7 case and a chapter 13 case. The format has been revised to resemble that used in Exhibit D to Form 1, described above.

(u) Official Form 24, Certification to Court of Appeals by All Parties -

The form is unchanged from the October 2005 version.

(v) Official Form 25A, [Name of Proponent]'s Plan of Reorganization, Dated [Insert Date] -

This form is new. It implements § 433 of the 2005 Act. Section 433 specifies that the Judicial Conference is to prescribe a form of reorganization plan for use in a small business case under chapter 11 of the Code and is to do so "within a reasonable period of time after the date of enactment" of the 2005 Act. The form is intended to be used in conjunction with the small business chapter 11 disclosure statement (proposed Official Form 25B), also required to be prescribed by § 433 of the Act. Because the form is to be used in small cases, those with less than $2 million in assets, the Advisory Committee also drafted instructions for completing the form. Because the type of debtor and details of a proposed reorganization will be quite varied, the difficulties inherent in drafting a new and complex form, and the latitude in timing afforded by § 433, the Advisory Committee did not attempt to complete the form by October 2005. The Advisory Committee expects to receive useful commentary on the proposed form during the comment period.

(w) Official Form 25B, [Name of Plan Proponent]'s Disclosure Statement, Dated [Insert Date] -

This form is new. It implements § 433 of the 2005 Act. Section 433 also specifies that the Judicial Conference is to prescribe a form of disclosure statement for use in a small business case under chapter 11 of the Code and is to do so "within a reasonable period of time after the date of enactment" of the 2005 Act. The form is intended to be used in conjunction with the small business chapter 11 plan of reorganization (proposed Official Form 25A). Because the type of debtor and details of its financial circumstances will be quite varied, the difficulties inherent in drafting a new and complex form, and the latitude in timing afforded by § 433, the Advisory Committee did not attempt to complete the task by October 2005. The Advisory Committee expects to receive useful commentary on the proposed form during the comment period.

(x) Official Form 25C, Small Business Monthly Operating Report -

This form is new. It implements §§ 434 and 435 of the 2005 Act, which provide for rules and an official form to assist small business debtors in chapter 11 cases to fulfill their financial reporting responsibilities under § 308 of the Code, a provision added by the 2005 Act. Section 434 also provides that these reporting requirements will not take effect until 60 days after the effective date of an official form. Rule 2015 already requires a chapter 11 debtor that is operating a business to file reports on its operations. Currently, these debtors use forms developed locally by United States trustees and bankruptcy administrators. The proposed form directs the debtor to disclose all the information specified in § 308; it is modeled on the local forms developed by the United States trustees.

(y) Official Form 26, Periodic Report Concerning Related Entities -

This form is new. It implements § 419 of the 2005 Act, which requires every chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required under proposed new Rule 2015.3. The form was designed with input from accounting professionals and includes instructions and examples of the types of information to be provided.

2. *Proposed Amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24, and new proposed Official Forms Exhibit D to Form 1, 25A, 25B, 25C, and 26.*

(Official Form 1) (12/08)

United States Bankruptcy Court
_____ DISTRICT OF _____

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual Taxpayer I.D. (ITIN) No./Complete EIN (If more than one, state all.):	Last four digits of Soc. Sec. or Individual Taxpayer I.D. (ITIN) No./Complete EIN (If more than one, state all.):
Street Address of Debtor (No. & Street, City, and State): ZIP CODE	Street Address of Joint Debtor (No. & Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE

Location of Principal Assets of Business Debtor (if different from street address above): ZIP CODE

Type of Debtor
(Form of Organization)
(Check **one** box.)

- ☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ☐ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business
(Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☐ Other

Tax-Exempt Entity
(Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check **one** box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts
(Check one box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☐ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☐ Full Filing Fee attached.
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:
- ☐ Debtor is a small business debtor as defined in 11 U S.C. § 101(51D).
- ☐ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:
- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2 million.

Check all applicable boxes:
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

Estimated Number of Creditors

1-49	50-99	100-199	200-999	1,000-5,000	5,001-10,000	10,001-25,000	25,001-50,000	50,001-100,000	Over 100,000
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Assets

☐ $0 to $10,000	☐ $10,000 to $100,000	☐ $100,000 to $1 million	☐ $1 million to $100 million	☐ More than $100 million

Estimated Liabilities

☐ $0 to $50,000	☐ $50,000 to $100,000	☐ $100,000 to $1 million	☐ $1 million to $100 million	☐ More than $100 million

THIS SPACE IS FOR COURT USE ONLY

Voluntary Petition *(This page must be completed and filed in every case.)*	Name of Debtor(s):	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed:	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I have delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____

Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☐ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box.)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Statement by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____

(Name of landlord that obtained judgment)

_____

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included with this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s):

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19B is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Official Form 1, Exhibit D
(12/08)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____ Case No. _____
Debtor(s) (If known)

EXHIBIT D - INDIVIDUAL DEBTOR'S STATEMENT OF COMPLIANCE WITH CREDIT COUNSELING REQUIREMENT

Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file. If that happens, you will lose whatever filing fee you paid, and your creditors will be able to resume collection activities against you. If your case is dismissed and you file another bankruptcy case later, you may be required to pay a second filing fee and you may have to take extra steps to stop creditors' collection activities.

Every individual debtor must file this Exhibit D. If a joint petition is filed, each spouse must complete and file a separate Exhibit D. Check one of the five statements below and attach any documents as directed.

☐ 1. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, and I have a certificate from the agency describing the services provided to me. *Attach a copy of the certificate and a copy of any debt repayment plan developed through the agency.*

☐ 2. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. *You must file a copy of a certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 15 days after your bankruptcy case is filed.*

☐ 3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made my request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now. *[Must be accompanied by a motion for determination by the court.]*
[Summarize exigent circumstances here.]

_____

_____.

If the court is satisfied with the reasons stated in your motion, it will send you an order approving your request. You must still obtain the credit counseling briefing within the first 30 days after you file your bankruptcy case and promptly file a certificate from the agency that provided the briefing, together with a copy of any debt management plan developed through the agency. Any extension of the 30-day deadline can be granted only for cause and is limited to a maximum of 15 days. A motion for extension must be filed within the 30-day period. Failure to fulfill these requirements may result in dismissal of your case. If the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing, your case may be dismissed.

4. I am not required to receive a credit counseling briefing because of: *[Check the applicable statement.] [Must be accompanied by a motion for determination by the court.]*

☐ Incapacity. (Defined in 11 U.S.C. § 109 (h)(4) as impaired by reason of mental illness or mental deficiency so as to be incapable of realizing and making rational decisions with respect to financial responsibilities.);

☐ Disability. (Defined in 11 U.S.C. § 109(h)(4) as physically impaired to the extent of being unable, after reasonable effort, to participate in a credit counseling briefing in person, by telephone, or through the Internet.);

☐ Active military duty in a military combat zone.

☐ 5. The United States trustee or bankruptcy administrator has determined that the credit counseling requirement of 11 U.S.C. § 109(h) does not apply in this district.

I certify under penalty of perjury that the information provided above is true and correct.

Signature of Debtor: _____

Date: _____

COMMITTEE NOTE

The form is amended to implement amendments to the Bankruptcy Code contained in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005)("BAPCPA"). The period for which the debtor must provide all names used and information about any prior bankruptcy cases is now eight years to match the required time between the granting of discharges to the same debtor in § 727(a)(8) of the Code as amended in 2005. In conformity with Rule 9037, the debtor is directed to provide only the last four digits of any individual's tax identification number.

The box indicating the debtor's selection of a chapter under which to file the case is amended to delete "Sec. 304 - Case ancillary to foreign proceeding" and replace it with "Chapter 15 Petition for Recognition of a Foreign Main Proceeding" and "Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding" reflecting the 2005 repeal of § 304 and enactment of chapter 15 of the Code. A statement of venue to be used in a chapter 15 case also is added on page 2 of the form.

The section labeled "Type of Debtor" is amended to include, below the checkbox for "Individual or Joint," a direction to "See Exhibit D on page 2 of this form." This addition alerts individual debtors that Exhibit D on page 2 of the form applies to them. Exhibit D, more fully described below, addresses the prepetition credit counseling requirements added to the Code by BAPCPA. The subtitle, "Form of Organization," is added, and this section also is revised to make clear that a limited liability corporation ("LLC") or limited liability partnership ("LLP") should identify itself as a "corporation."

The form also is amended in several ways to assist the courts in evaluating their workload and fulfilling the statistical reporting requirements of 28 U.S.C. § 159, enacted as part of BAPCPA. Accordingly, a new section of the form labeled "Nature of Business," is added that contains both existing checkboxes that identify certain types of debtors for which the Bankruptcy Code provides special treatment, such as stockbrokers and railroads, and a new checkbox for a "health care business" for which the 2005 amendments to the Code include specific requirements. This section of the form also contains a checkbox for single asset real estate debtors, so they can be identified at the time of filing. All other businesses will mark the checkbox labeled "Other." Another new section titled

"Tax-Exempt Entity" contains a checkbox to be used by qualified organizations. The Judicial Conference of the United States and the Administrative Office of the United States Courts will use this information in preparing statistical reports and analyses for Congress.

A checkbox also is added for an individual debtor to indicate that the debtor is applying for a waiver of the filing fee, to implement the 2005 enactment of 28 U.S.C. § 1930(f) authorizing the bankruptcy court to waive the filing fee in certain circumstances. The description directs the debtor to the Official Form for the application that must be filed for the court's consideration.

The section labeled "Nature of Debts" is amended to state the statutory definition of a "consumer debt" and to modify both the consumer and business categories by adding the word "primarily" to both choices to make it clearer to individual debtors that "business" may be the appropriate choice if personal debts have been incurred to finance a business venture.

Although the 2005 Act eliminated from the Code any option to elect to be treated as a "small business" in a chapter 11 case, new provisions for "small business" debtors added by BAPCPA make it desirable to identify eligible debtors at the outset of the case. Accordingly, the section of the form labeled "Chapter 11 Small Business" is revised and renamed "Chapter 11 Debtors" for this purpose. Chapter 11 debtors that meet the definition of "small business debtor" in § 101 of the Code are directed to identify themselves in this section of the form. Chapter 11 debtors whose aggregate noncontingent debts owed to non-insiders or affiliates are less than $2 million are directed to identify themselves in this section. A third part of this section attempts to identify chapter 11 cases that are filed as pre-packaged cases, using criteria taken from § 1126(b) of the Code. Identifying "pre-packs" at filing will assist judges and court staff to manage these cases appropriately.

The statistical information concerning the number of creditors is revised to provide more detail, and the information requested concerning estimated assets and liabilities is abbreviated, with the number of ranges reduced and the scope of each range amended. Statistical reports now will be derived from actual dollar amounts of assets and liabilities as shown on the debtor's schedules. The information requested on the petition, accordingly, is for case management and public information purposes.

BAPCPA also added a new § 109(h) to the Code. To implement this provision, a section labeled "Exhibit D" is inserted on page 2 of the form, and a separate Exhibit D is added. These additions will enable individual debtors to certify that they have received budget and credit counseling prior to filing, as required by § 109(h), or request a temporary waiver of, or exemption from, the requirement, if they meet the statutory requirements for such relief. Exhibit D

includes directions to attach required documentation or, if the debtor requests a temporary waiver or exemption, a motion for a determination by the court. Exhibit D also states the requirement that all individual debtors must obtain a briefing from an approved credit counseling agency before filing a bankruptcy case, unless one of the very limited exceptions applies, and further states the consequences that may be faced by any debtor who fails to comply.

Space is provided on page 2 for a debtor who is a tenant of residential real property to state whether the debtor's landlord has a judgment against the debtor for possession of the premises, whether under applicable nonbankruptcy law the debtor would be permitted to cure the monetary default, and whether the debtor has made the appropriate deposit with the court. This addition to the form implements § 362(l) which was added to the Code in 2005.

The signature sections and the declaration under penalty of perjury by an individual debtor concerning the notice received about bankruptcy relief, the declaration under penalty of perjury by a bankruptcy petition preparer, and the declaration and certification by an attorney are amended to include new material mandated by the 2005 Act. A signature section also is provided for a representative of a foreign proceeding.

Form 3A
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

APPLICATION TO PAY FILING FEE IN INSTALLMENTS

1. In accordance with Fed. R. Bankr. P. 1006, I apply for permission to pay the filing fee amounting to $_____ in installments.

2. I am unable to pay the filing fee except in installments.

3. Until the filing fee is paid in full, I will not make any additional payment or transfer any additional property to an attorney or any other person for services in connection with this case.

4. I propose the following terms for the payment of the Filing Fee.*

   $ _____ Check one ☐ With the filing of the petition, or
   ☐ On or before _____

   $ _____ on or before _____

   $ _____ on or before _____

   $ _____ on or before _____

* The number of installments proposed shall not exceed four (4), and the final installment shall be payable not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition. Fed. R. Bankr. P. 1006(b)(2).

5. I understand that if I fail to pay any installment when due, my bankruptcy case may be dismissed and I may not receive a discharge of my debts.

_____
Signature of Attorney Date

_____
Name of Attorney

_____
Signature of Debtor Date
(In a joint case, both spouses must sign.)

_____
Signature of Joint Debtor (if any) Date

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required under that section; and (4) I will not accept any additional money or other property from the debtor before the filing fee is paid in full.

_____
Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

_____
Social Security No. (Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs the document.

_____

_____
Address

x_____
Signature of Bankruptcy Petition Preparer

_____
Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person. A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 3A Contd.
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

ORDER APPROVING PAYMENT OF FILING FEE IN INSTALLMENTS

☐ IT IS ORDERED that the debtor(s) may pay the filing fee in installments on the terms proposed in the foregoing application.

☐ IT IS ORDERED that the debtor(s) shall pay the filing fee according to the following terms:

$ _____ Check one ☐ With the filing of the petition, or
☐ On or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

☐ IT IS FURTHER ORDERED that until the filing fee is paid in full the debtor(s) shall not make any additional payment or transfer any additional property to an attorney or any other person for services in connection with this case.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

Form 3A

COMMITTEE NOTE

The form is amended to direct the debtor to state that, until the filing fee is paid in full, the debtor will not make any additional payment or transfer any additional property to an attorney or any other person for services in connection with the case. The declaration and certification by a non-attorney bankruptcy petition preparer in the form are amended to include material mandated by § 110 of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). The certification by a non-attorney bankruptcy petition preparer is re-named a declaration and also is revised to include material mandated by § 110 of the Code as amended in 2005. The order is amended to provide space for the court to set forth a payment schedule other than the one proposed by the debtor.

Form B3B
(12/08)

APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS

The court fee for filing a case under chapter 7 of the Bankruptcy Code is $299.

If you cannot afford to pay the full fee at the time of filing, you may apply to pay the fee in installments. A form, which is available from the bankruptcy clerk's office, must be completed to make that application. If your application to pay in installments is approved, you will be permitted to file your petition, generally completing payment of the fee over the course of four to six months.

If you cannot afford to pay the fee either in full at the time of filing or in installments, you may request a waiver of the filing fee by completing this application and filing it with the Clerk of Court. A judge will decide whether you have to pay the fee. By law, the judge may waive the fee only if your income is less than 150 percent of the official poverty line applicable to your family size and you are unable to pay the fee in installments. You may obtain information about the poverty guidelines at www.uscourts.gov or in the bankruptcy clerk's office.

Required information. Complete all items in the application, and attach requested schedules. Then sign the application on the last page. If you and your spouse are filing a joint bankruptcy petition, you both must provide information as requested and sign the application.

Form B3B
(12/08)

In re: _____ Case No. _____
Debtor(s) (if known)

APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on Schedule I (Current Income of Individual Debtors(s)), how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.) _____

2. Restate the following information that you provided, or will provide, on Line 16 of Schedule I. Attach a completed copy of Schedule I, if it is available.

   Total Combined Monthly Income (Line 16 of Schedule I): $_____

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include any income already reported in Item 2. If none, enter $0.

   $_____

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

   $_____

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___

   If yes, explain.

Part B: Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

   $ _____

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___
   If yes, explain.

Part C. Real and Personal Property

EITHER (1) attach completed copies of Schedules A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand: $ _____

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, CD:	Amount:
_____	_____	$ _____
_____	_____	$ _____

10. State below the assets owned by you. **Do not list ordinary household furnishings and clothing.**

Home	Address: _____ _____	Value: $ _____ Amount owed on mortgages and liens: $ _____
Other real estate	Address: _____ _____	Value: $ _____ Amount owed on mortgages and liens: $ _____
Motor vehicle	Model/Year: _____ _____	Value: $ _____ Amount owed: $ _____
Motor vehicle	Model/Year: _____ _____	Value: $ _____ Amount owed: $ _____
Other	Description_____ _____	Value: $ _____ Amount owed: $ _____

11. State below any person, business, organization, or governmental unit that owes you money and the amount that is owed.

Name of Person, Business, or Organization that Owes You Money	Amount Owed
_____	$ _____
_____	$ _____

Part D. Additional Information.

12. Have you paid an **attorney** any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you paid? $ _____

13. Have you promised to pay or do you anticipate paying an **attorney** in connection with your bankruptcy case? Yes ___ No ___
If yes, how much have you promised to pay or do you anticipate paying? $ _____

14. Have you paid **anyone other than an attorney** (such as a bankruptcy petition preparer, paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you paid? $ _____

15. Have you promised to pay or do you anticipate paying **anyone other than an attorney** (such as a bankruptcy petition preparer, paralegal, typing service, or another person) any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules? Yes ___ No ___
If yes, how much have you promised to pay or do you anticipate paying? $ _____

16. Has anyone paid an attorney or other person or service in connection with this case, on your behalf? Yes ___ No ___

If yes, explain.

Form B3B Cont.
(12/08)

17. Have you previously filed for bankruptcy relief during the past eight years? Yes ___ No ___

Case Number (if known)	Year filed	Location of filing	Did you obtain a discharge? (if known)
_____	_____	_____	Yes ____ No ____ Don't know ____
_____	_____	_____	Yes ____ No ____ Don't know ____

18. Please provide any other information that helps to explain why you are unable to pay the filing fee in installments.

19. I (we) declare under penalty of perjury that I (we) cannot currently afford to pay the filing fee in full or in installments and that the foregoing information is true and correct.

Executed on: _____ _____
Date Signature of Debtor

_____ _____
Date Signature of Co-debtor

DECLARATION AND SIGNATURE OF BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required under that section.

_____ _____
Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer Social Security No. (Required by 11 U.S.C. §110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs the document.

_____

_____
Address

x_____ _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.
A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form B3B
(12/08)

United State Bankruptcy Court
_____ District of _____

In re: _____ Case No. _____
Debtor(s)

ORDER ON DEBTOR'S APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE

Upon consideration of the debtor's "Application for Waiver of the Chapter 7 Filing Fee," the court orders that the application be:

[ ] GRANTED.

This order is subject to being vacated at a later time if developments in the administration of the bankruptcy case demonstrate that the waiver was unwarranted.

[ ] DENIED.

The debtor shall pay the chapter 7 filing fee according to the following terms:

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

$ _____ on or before _____

Until the filing fee is paid in full, the debtor shall not make any additional payment or transfer any additional property to an attorney or any other person for services in connection with this case.

IF THE DEBTOR FAILS TO TIMELY PAY THE FILING FEE IN FULL OR TO TIMELY MAKE INSTALLMENT PAYMENTS, THE COURT MAY DISMISS THE DEBTOR'S CASE.

[ ] SCHEDULED FOR HEARING.

A hearing to consider the debtor's "Application for Waiver of the Chapter 7 Filing Fee" shall be held on _____ at _____ am/pm at _____.
(address of courthouse)

IF THE DEBTOR FAILS TO APPEAR AT THE SCHEDULED HEARING, THE COURT MAY DEEM SUCH FAILURE TO BE THE DEBTOR'S CONSENT TO THE ENTRY OF AN ORDER DENYING THE FEE WAIVER APPLICATION BY DEFAULT.

BY THE COURT:

DATE: _____

_____
United States Bankruptcy Judge

COMMITTEE NOTE

This form is new. 28 U.S.C. § 1930(f), enacted as part of the Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), provides that "under procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line . . . applicable to a family of the size involved and is unable to pay that fee in installments." To implement this provision, Fed. R. Bankr. P.1006 adds a new subdivision (c). Official Form 3B is the form referenced in that subdivision, and is to be used by individual chapter 7 debtors when applying for a waiver of the filing fee. A corresponding standard order also is included.

Form 4
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [*or* chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101, or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims. If a minor child is one of the creditors holding the 20 largest unsecured claims, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

(1)	(2)	(3)	(4)	(5)
Name of creditor and complete mailing address, including zip code	*Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	*Nature of claim (trade debt, bank loan, government contract, etc.)*	*Indicate if claim is contingent, unliquidated, disputed or subject to setoff*	*Amount of claim [if secured also state value of security]*

Date: _____

_____
Debtor

[Declaration as in Form 2]

COMMITTEE NOTE

The form is amended to direct that the name of any minor child not be disclosed. The amendment implements § 112 of the Code, which was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). In addition, the form is amended to add to the reference to Rule 1007(m) a direction to include for noticing purposes the name, address, and legal relationship to the child of "a person described" in that rule. Rule 1007(m) requires the person named to be someone on whom process would be served in an adversary proceeding against the child.

FORM B5 (12/08)

United States Bankruptcy Court

_____ District of _____

INVOLUNTARY PETITION

IN RE (Name of Debtor – If Individual: Last, First, Middle)	ALL OTHER NAMES used by debtor in the last 8 years (Include married, maiden, and trade names.)
Last four digits of Soc. Sec. or other Individual's Tax I.D. No./Complete EIN (If more than one, state all.):	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS ZIP CODE	MAILING ADDRESS OF DEBTOR (If different from street address) ZIP CODE

LOCATION OF PRINCIPAL ASSETS OF BUSINESS DEBTOR (If different from previously listed addresses)

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 ☐ Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Nature of Debts (Check **one** box.)	**Type of Debtor** (Form of Organization)	**Nature of Business** (Check **one** box.)
Petitioners believe: ☐ Debts are primarily consumer debts ☐ Debts are primarily business debts	☐ Individual (Includes Joint Debtor) ☐ Corporation (Includes LLC and LLP) ☐ Other (If debtor is not one of the above entities, check this box and provide the information provided below.) State Type of Entity: _____	☐ Health Care Business ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51)(B) ☐ Railroad ☐ Stockbroker ☐ Commodity Broker ☐ Clearing Bank ☐ Other

VENUE	**FILING FEE** (Check one box)
☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District. ☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.	☐ Full Filing Fee attached ☐ Petitioner is a child support creditor or its representative, and the form specified in § 304 (g) of the Bankruptcy Reform Act of 1994 is attached. *[If a child support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304 (g) of the Bankruptcy Reform Act of 1994, no fee is required.]*

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OR AFFILIATE OF THIS DEBTOR (Report information for any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. Petitioner (s) are eligible to file this petition pursuant to 11 U.S.C. § 303 (b).
2. The debtor is a person against whom an order for relief may be entered under title 11 of the United States Code.

3.a. The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount;

or

b. Within 120 days preceding the filing of this petition, a custodian, other than a trustee receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

Name of Debtor_____

Case No._____

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

x_____ Signature of Petitioner or Representative (State title)	x_____ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address Telephone No.
x_____ Signature of Petitioner or Representative (State title)	x_____ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address Telephone No.
x_____ Signature of Petitioner or Representative (State title)	x_____ Signature of Attorney Date
Name of Petitioner Date Signed	Name of Attorney Firm (If any)
Name & Mailing Address of Individual Signing in Representative Capacity	Address Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

_____continuation sheets attached

COMMITTEE NOTE

The form has been amended to delete statistical information about the debtor that no longer is required, and substitute checkboxes similar to those on the voluntary petition form. The form also is amended to add "as to liability or amount" to the language concerning debts that are the subject of a bona fide dispute, in conformity with § 303 of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). The petitioning creditors must now provide, to the extent known to them, all other names used by the debtor during the 8 years, rather than 6 years, before the filing of the petition. In conformity with Rule 9037, the petitioning creditors are directed to provide only the last four digits of any individual's tax identification number. A new checkbox is provided for the petitioning creditors to identify the debtor that is a "health care business" as defined in § 101 of the Code, thereby alerting the court and the United States trustee of the necessity under § 333 of the Code to appoint an ombudsman to represent the interests of the patients of the health care business. These amendments also implement the 2005 amendments to the Code. A new checkbox also is provided for a "clearing bank," which may become a debtor upon the filing of a petition at the direction of the Board of Governors of the Federal Reserve System; this addition conforms to an amendment to § 109(b)(2) of the Code which was enacted in 2000.

Form B6
(12/08)

FORM 6. SCHEDULES

Summary of Schedules
Statistical Summary of Certain Liabilities and Related Data (28 U.S.C. § 159)

Schedule A - Real Property
Schedule B - Personal Property
Schedule C - Property Claimed as Exempt
Schedule D - Creditors Holding Secured Claims
Schedule E - Creditors Holding Unsecured Priority Claims
Schedule F - Creditors Holding Unsecured Nonpriority Claims
Schedule G - Executory Contracts and Unexpired Leases
Schedule H - Codebtors
Schedule I - Current Income of Individual Debtor(s)
Schedule J - Current Expenditures of Individual Debtors(s)

Unsworn Declaration Under Penalty of Perjury

GENERAL INSTRUCTIONS: The first page of the debtor's schedules and the first page of any amendments thereto must contain a caption as in Form 16B. Subsequent pages should be identified with the debtor's name and case number. If the schedules are filed with the ptition, the case number should be left blank.

Schedules D, E, and F have been designed for the listing of each claim only once. Even when a claim is secured only in part or entitled to priority only in part, it still should be listed only once. A claim which is secured in whole or in part should be listed on Schedule D only, and a claim which is entitled to priority in whole or in part should be listed on Schedule E only. Do not list the same claim twice. If a creditor has more than one claim, such as claims arising from separate transactions, each claim should be scheduled separately.

Review the specific instructions for each schedule before completing the schedule.

Form 6-Summary
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Debtor

Case No. _____

Chapter _____

SUMMARY OF SCHEDULES

Indicate as to each schedule whether that schedule is attached and state the number of pages in each. Report the totals from Schedules A, B, D, E, F, I, and J in the boxes provided. Add the amounts from Schedules A and B to determine the total amount of the debtor's assets. Add the amounts of all claims from Schedules D, E, and F to determine the total amount of the debtor's liabilities. Individual debtors also must complete the "Statistical Summary of Certain Liabilities and Related Data" if they file a case under chapter 7, 11, or 13.

NAME OF SCHEDULE	ATTACHED (YES/NO)	NO. OF SHEETS	ASSETS	LIABILITIES	OTHER
A - Real Property			$		
B - Personal Property			$		
C - Property Claimed as Exempt					
D - Creditors Holding Secured Claims				$	
E - Creditors Holding Unsecured Priority Claims (Total of Claims on Schedule E)				$	
F - Creditors Holding Unsecured Nonpriority Claims				$	
G - Executory Contracts and Unexpired Leases					
H - Codebtors					
I - Current Income of Individual Debtor(s)					$
J - Current Expenditures of Individual Debtors(s)					$
TOTAL			$	$	

Form 6-Summ2
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

STATISTICAL SUMMARY OF CERTAIN LIABILITIES AND RELATED DATA (28 U.S.C. § 159)

If you are an individual debtor whose debts are primarily consumer debts, as defined in § 101(8) of the Bankruptcy Code (11 U.S.C. § 101(8)), filing a case under chapter 7, 11 or 13, you must report all information requested below.

☐ Check this box, if you are an individual debtor whose debts are NOT primarily consumer debts and, therefore, are not required to report any information here.

This information is for statistical purposes only under 28 U.S.C. § 159.

Summarize the following types of liabilities, as reported in the Schedules, and total them.

Type of Liability	Amount
Domestic Support Obligations (from Schedule E)	$
Taxes and Certain Other Debts Owed to Governmental Units (from Schedule E)	$
Claims for Death or Personal Injury While Debtor Was Intoxicated (from Schedule E) (whether disputed or undisputed)	$
Student Loan Obligations (from Schedule F)	$
Domestic Support, Separation Agreement, and Divorce Decree Obligations Not Reported on Schedule E	$
Obligations to Pension or Profit-Sharing, and Other Similar Obligations (from Schedule F)	$
TOTAL	$

State the following:

Average Income (from Schedule I, Line 16)	$
Average Expenses (from Schedule J, Line 18)	$
Current Monthly Income (from Form 22A Line 12; **OR**, Form 22B Line 11; **OR**, Form 22C Line 20)	$

State the following:

1. Total from Schedule D, "UNSECURED PORTION, IF ANY" column		$
2. Total from Schedule E, "AMOUNT ENTITLED TO PRIORITY" column.	$	
3. Total from Schedule E, "AMOUNT NOT ENTITLED TO PRIORITY, IF ANY" column		$
4. Total from Schedule F		$
5. Total of non-priority unsecured debt (sum of 1, 3, and 4)		$

Form B6A
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE A - REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a co-tenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether husband, wife, or both own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim."

If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C - Property Claimed as Exempt.

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
		Total➤		

(Report also on Summary of Schedules.)

Form B6B
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE B - PERSONAL PROPERTY

Except as directed below, list all personal property of the debtor of whatever kind. If the debtor has no property in one or more of the categories, place an "x" in the appropriate position in the column labeled "None." If additional space is needed in any category, attach a separate sheet properly identified with the case name, case number, and the number of the category. If the debtor is married, state whether husband, wife, or both own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor is an individual or a joint petition is filed, state the amount of any exemptions claimed only in Schedule C - Property Claimed as Exempt.

Do not list interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If the property is being held for the debtor by someone else, state that person's name and address under "Description and Location of Property." In providing the information requested in this schedule, do not include the name or address of a minor child. Simply state "a minor child." See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the child of a person described in Fed. R. Bankr. P. 1007(m).

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITH-OUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
1. Cash on hand.				
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.				
3. Security deposits with public utilities, telephone companies, landlords, and others.				
4. Household goods and furnishings, including audio, video, and computer equipment.				
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.				
6. Wearing apparel.				
7. Furs and jewelry.				
8. Firearms and sports, photographic, and other hobby equipment.				
9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.				
10. Annuities. Itemize and name each issuer.				
11. Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c).)				

Form B6B-Cont
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITH-OUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
12. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.				
13. Stock and interests in incorporated and unincorporated businesses. Itemize.				
14. Interests in partnerships or joint ventures. Itemize.				
15. Government and corporate bonds and other negotiable and non-negotiable instruments.				
16. Accounts receivable.				
17. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.				
18. Other liquidated debts owed to debtor including tax refunds. Give particulars.				
19. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A – Real Property.				
20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.				
21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.				

Form B6B-cont.
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE B -PERSONAL PROPERTY

(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITH-OUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
22. Patents, copyrights, and other intellectual property. Give particulars.				
23. Licenses, franchises, and other general intangibles. Give particulars.				
24. Customer lists or other compilations containing personally identifiable information (as defined in 11 U.S.C. § 101(41A)) provided to the debtor by individuals in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes.				
25. Automobiles, trucks, trailers, and other vehicles and accessories.				
26. Boats, motors, and accessories.				
27. Aircraft and accessories.				
28. Office equipment, furnishings, and supplies.				
29. Machinery, fixtures, equipment, and supplies used in business.				
30. Inventory.				
31. Animals.				
32. Crops - growing or harvested. Give particulars.				
33. Farming equipment and implements.				
34. Farm supplies, chemicals, and feed.				
35. Other personal property of any kind not already listed. Itemize.				
		_____continuation sheets attached Total➤		$

(Include amounts from any continuation sheets attached. Report total also on Summary of Schedules.)

Form B6C
(12/08)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor claims the exemptions to which debtor is entitled under:
(Check one box)
☐ 11 U.S.C. § 522(b)(2)
☐ 11 U.S.C. § 522(b)(3)

☐ Check if debtor claims a homestead exemption that exceeds $125,000.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION

Form B6D (12/08)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE D – CREDITORS HOLDING SECURED CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number of all entities holding claims secured by property of the debtor as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. List creditors holding all types of secured interests such as judgment liens, garnishments, statutory liens, mortgages, deeds of trust, and other security interests.

List creditors in alphabetical order to the extent practicable. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m). If all secured creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H – Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Total the columns labeled "Amount of Claim Without Deducting Value of Collateral" and "Unsecured Portion, if Any" in the boxes labeled "Total(s)" on the last sheet of the completed schedule. Report the total from the column labeled "Amount of Claim Without Deducting Value of Collateral" also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts, report the total from the column labeled "Unsecured Portion, if Any" on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (*See Instructions Above*)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
_____continuation sheets attached			Subtotal ► (Total of this page)				$	$
			Total ► (Use only on last page)				$	$
							(Report also on Summary of Schedules.)	(If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

Form B6D – Cont.
(12/08)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE D – CREDITORS HOLDING SECURED CLAIMS
(Continuation Sheet)

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (*See Instructions Above*)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
ACCOUNT NO.			VALUE $					
Sheet no.___of___continuation sheets attached to Schedule of Creditors Holding Secured Claims			Subtotal (s)► (Total(s) of this page)				$	$
			Total(s) ► (Use only on last page)				$ (Report also on Summary of Schedules.)	$ (If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

Form B6E
(12/08)

In re _____, Case No. _____
Debtor (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name, mailing address, including zip code, and last four digits of the account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition. Use a separate continuation sheet for each type of priority and label each with the type of priority.

The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W,""J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules.

Report the total of amounts entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts who file a case under chapter 7 or 13 report this total also on the Statistical Summary of Certain Liabilities and Related Data.

Report the total of amounts not entitled to priority listed on each sheet in the box labeled "Subtotals" on each sheet. Report the total of all amounts not entitled to priority listed on this Schedule E in the box labeled "Totals" on the last sheet of the completed schedule. Individual debtors with primarily consumer debts who file a case under chapter 7 report this total also on the Statistical Summary of Certain Liabilities and Related Data.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Domestic Support Obligations**

Claims for domestic support that are owed to or recoverable by a spouse, former spouse, or child of the debtor, or the parent, legal guardian, or responsible relative of such a child, or a governmental unit to whom such a domestic support claim has been assigned to the extent provided in 11 U.S.C. § 507(a)(1).

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(3).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $10,000* per person earned within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(5).

In re _____, Case No._____
Debtor (if known)

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,925* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(6).

☐ **Deposits by individuals**

Claims of individuals up to $2,225* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

☐ **Claims for Death or Personal Injury While Debtor Was Intoxicated**

Claims for death or personal injury resulting from the operation of a motor vehicle or vessel while the debtor was intoxicated from using alcohol, a drug, or another substance. 11 U.S.C. § 507(a)(10).

* Amounts are subject to adjustment on April 1, 2007, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

Form B6E Contd.
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

(Continuation Sheet)

Type of Priority for Claims Listed on This Sheet

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM	AMOUNT ENTITLED TO PRIORITY	AMOUNT NOT ENTITLED TO PRIORITY, IF ANY
Account No.									
Account No.									
Account No.									
Account No.									
Sheet no. ___ of ___ sheets attached to Schedule of Creditors Holding Priority Claims						Subtotals➤ (Totals of this page)	$	$	
						Total➤ (Use only on last page of the completed Schedule E. Report also on the Summary of Schedules.)	$		
						Totals➤ (Use only on last page of the completed Schedule E. If applicable, report also on the Statistical Summary of Certain Liabilities and Related Data.)		$	$

Form B6F (12/08)

In re _____, Case No. _____

Debtor (If known)

SCHEDULE F- CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

State the name, mailing address, including zip code, and last four digits of any account number, of all entities holding unsecured claims without priority against the debtor or the property of the debtor, as of the date of filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so. If a minor child is a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m). Do not include claims listed in Schedules D and E. If all creditors will not fit on this page, use the continuation sheet provided.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H - Codebtors. If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of all claims listed on this schedule in the box labeled "Total" on the last sheet of the completed schedule. Report this total also on the Summary of Schedules and, if the debtor is an individual with primarily consumer debts filing a case under chapter 7, report this total also on the Statistical Summary of Certain Liabilities and Related Data..

☐ Check this box if debtor has no creditors holding unsecured claims to report on this Schedule F.

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
						Subtotal➤	$
						Total➤ (Use only on last page of the completed Schedule F.) (Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.)	$

_____continuation sheets attached

Form B6F Contd.
(12/08)

In re _____, Case No. _____
Debtor (If known)

SCHEDULE F - CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS

(Continuation Sheet)

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions above.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM. IF CLAIM IS SUBJECT TO SETOFF, SO STATE.	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							
ACCOUNT NO.							

Sheet no.___of___sheets attached to Schedule of Creditors Holding Unsecured Nonpriority Claims

Subtotal➤ $

Total➤ $
(Use only on last page of the completed Schedule F.)
(Report also on Summary of Schedules and, if applicable on the Statistical Summary of Certain Liabilities and Related Data.)

Form B6G
(12/08)

In re _____,
Debtor

Case No._____
(if known)

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests. State nature of debtor's interest in contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease. Provide the names and complete mailing addresses of all other parties to each lease or contract described. If a minor child is a party to one of the leases or contracts, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

☐ Check this box if debtor has no executory contracts or unexpired leases.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT.	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT.

Form B6H
(12/08)

In re _____ ,
Debtor

Case No. _____
(if known)

SCHEDULE H - CODEBTORS

Provide the information requested concerning any person or entity, other than a spouse in a joint case, that is also liable on any debts listed by debtor in the schedules of creditors. Include all guarantors and co-signers. If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the eight year period immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state, commonwealth, or territory. Include all names used by the nondebtor spouse during the eight years immediately preceding the commencement of this case. If a minor child is a codebtor or a creditor, indicate that by stating "a minor child" and do not disclose the child's name. See 11 U.S.C. § 112. If "a minor child" is stated, also include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

☐ Check this box if debtor has no codebtors.

NAME AND ADDRESS OF CODEBTOR	NAME AND ADDRESS OF CREDITOR

Form B6I
(12/08)

In re _____, Case No._____
Debtor (if known)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Do not state the name of any minor child.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP:	AGE:

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

INCOME: (Estimate of average or projected monthly income at time case filed)	DEBTOR	SPOUSE
1. Monthly gross wages, salary, and commissions (Prorate if not paid monthly.)	$_____	$_____
2. Estimate monthly overtime	$_____	$_____
3. SUBTOTAL	$_____	$_____
4. LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$_____	$_____
b. Insurance	$_____	$_____
c. Union dues	$_____	$_____
d. Other (Specify): _____	$_____	$_____
5. SUBTOTAL OF PAYROLL DEDUCTIONS	$_____	$_____
6. TOTAL NET MONTHLY TAKE HOME PAY	$_____	$_____
7. Regular income from operation of business or profession or farm. (Attach detailed statement)	$_____	$_____
8. Income from real property	$_____	$_____
9. Interest and dividends	$_____	$_____
10. Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$_____	$_____
11. Social security or government assistance (Specify):_____	$_____	$_____
12. Pension or retirement income	$_____	$_____
13. Other monthly income (Specify):_____	$_____	$_____
14. SUBTOTAL OF LINES 7 THROUGH 13	$_____	$_____
15. AVERAGE MONTHLY INCOME (Add amounts shown on lines 6 and 14)	$_____	$_____
16. COMBINED AVERAGE MONTHLY INCOME: (Combine column totals from line 15; if there is only one debtor repeat total reported on line 15.)	$_____	

(Report also on Summary of Schedules and, if applicable, on Statistical Summary of Certain Liabilities and Related Data.)

17. Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:

_____

_____

Form B6J
(12/08)

In re _____, Case No. _____
Debtor (if known)

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average or projected monthly expenses of the debtor and the debtor's family at time case filed. Prorate any payments made bi-weekly, quarterly, semi-annually, or annually to show monthly rate.

☐ Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse."

1. Rent or home mortgage payment (include lot rented for mobile home) $ _____
   a. Are real estate taxes included? Yes _____ No _____
   b. Is property insurance included? Yes _____ No _____
2. Utilities: a. Electricity and heating fuel $ _____
   b. Water and sewer $ _____
   c. Telephone $ _____
   d. Other _____ $ _____
3. Home maintenance (repairs and upkeep) $ _____
4. Food $ _____
5. Clothing $ _____
6. Laundry and dry cleaning $ _____
7. Medical and dental expenses $ _____
8. Transportation (not including car payments) $ _____
9. Recreation, clubs and entertainment, newspapers, magazines, etc. $ _____
10. Charitable contributions $ _____
11. Insurance (not deducted from wages or included in home mortgage payments)
    a. Homeowner's or renter's $ _____
    b. Life $ _____
    c. Health $ _____
    d. Auto $ _____
    e. Other _____ $ _____
12. Taxes (not deducted from wages or included in home mortgage payments)
    (Specify) _____ $ _____
13. Installment payments: (In chapter 11, 12, and 13 cases, do not list payments to be included in the plan)
    a. Auto $ _____
    b. Other _____ $ _____
    c. Other _____ $ _____
14. Alimony, maintenance, and support paid to others $ _____
15. Payments for support of additional dependents not living at your home $ _____
16. Regular expenses from operation of business, profession, or farm (attach detailed statement) $ _____
17. Other _____ $ _____
18. AVERAGE MONTHLY EXPENSES (Total lines 1-17. Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.) $ _____
19. Describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document:
    _____
20. STATEMENT OF MONTHLY NET INCOME
    a. Average monthly income from Line 15 of Schedule I $ _____
    b. Average monthly expenses from Line 18 above $ _____
    c. Monthly net income (a. minus b.) $ _____

Official Form 6-Decl.
(12/08)

In re _____ , Case No. _____
Debtor (If known)

DECLARATION CONCERNING DEBTOR'S SCHEDULES

DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR

I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ (Total shown on summary page plus 2.) sheets, and that they are true and correct to the best of my knowledge, information, and belief.

Date _____ Signature: _____
Debtor

Date _____ Signature: _____
(Joint Debtor, if any)

[If joint case, both spouses must sign.]

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h) and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.
(Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs this document.

_____

_____
Address

X _____ _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF A CORPORATION OR PARTNERSHIP

I, the _____ [the president or other officer or an authorized agent of the corporation or a member or an authorized agent of the partnership] of the _____ [corporation or partnership] named as debtor in this case, declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information, and belief. (Total shown on summary page plus 1.)

Date _____ Signature: _____

_____
[Print or type name of individual signing on behalf of debtor.]

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

Penalty for making a false statement or concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U S.C. §§ 152 and 3571.

COMMITTEE NOTE

The forms of the Schedules of Assets and Liabilities are amended to implement the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23, (April 20, 2005)("BAPCPA"). An amendment that directs the debtor to avoid disclosing the name of any minor child occurs in Schedules B, D, E, F, G, and H in conformity with § 112 which was added to the Code in 2005. Section 112 provides for the debtor to furnish the name of any minor child confidentially to the court, should the trustee need the information to evaluate properly the information filed by the debtor. In addition, those schedules are amended to add to the reference to Rule 1007(m), with respect to a minor child, a direction to include for noticing purposes the name, address, and legal relationship to the child of "a person described" in that rule. Rule 1007(m) requires the person named to be someone on whom process would be served in an adversary proceeding against the child.

The "Statistical Summary of Certain Liabilities and Related Data" is added to collect from individual debtors with primarily consumer debtors the information needed to prepare statistical reports required under 28 U.S.C. § 159, which was enacted as part of BAPCPA. Collecting the bulk of the information to be used in these statistical reports in the Summary of Schedules and the statistical summary will assist the courts and the Director of the Administrative Office to fulfill their statutory responsibilities. Schedules D and E are amended to provide additional totals and, together with Schedule F, to direct debtors who must complete the statistical summary to report total amounts there. Simlarly, Schedules I and J are amended to conform their terminology to that used in 28 U.S.C. § 159 and direct debtors who must complete the statistical summary to report the specified amounts there.

Schedules A, B, C, and D are amended to delete the word "market" from the columns in which the debtor reports the value of various kinds of property. Amendments to § 506 of the Code enacted in 2005 specify that "replacement value" must be used in connection with certain property. The schedules no longer specify "market" value and permit the debtor to choose the appropriate one, whether that be replacement, market, or some other value. Valuation of property, generally, is the subject of extensive provisions in the Code, and the deletion of the word "market" from the determinations of value to be made by the debtor on the schedules is intended to remove any inference about choice of valuation

standard. This deletion simply indicates that the form takes no position on which Code provision or valuation standard may be applicable in any particular instance.

The following paragraphs describe changes that are specific to each schedule.

Schedule B - Personal Property is amended to require the debtor to list any interests in an education IRA, because § 541(b)(5), added to the Code in 2005, makes special provision for them. The schedule also is amended to require the debtor to disclose the existence of any customer lists or other compilations containing personally identifiable information provided by an individual to the debtor in connection with obtaining a product or service from the debtor for personal, family, or household purposes. This amendment implements § 332, which was added to the Code by BAPCPA in 2005.

Schedule C - Property Claimed as Exempt is amended to delete descriptive information concerning the length of domicile required for the debtor to qualify to claim certain exemptions. Any summary of the BAPCPA amendments to § 522 of the Code concerning these requirements might inadvertently cause the debtor to lose important rights. Accordingly, the form now directs the debtor to indicate whether exemptions are being claimed under § 522(b)(2) or § 522(b)(3) and whether the debtor claims a homestead exemption that exceeds $125,000.

Schedule D - Creditors Holding Secured Claims is amended to provide for creating a total of any unsecured amounts (amounts that exceed the value of the collateral) owed to creditors holding secured claims. In addition to facilitating statistical reporting, providing a breakdown of the amounts owed to creditors listed on this schedule will assist the individual debtor in completing the means test calculation under § 707(b)(2)(A)(i) of the Code.

Schedule E - Creditors Holding Unsecured Priority Claims is amended to implement the changes in priority to which a claim may be entitled under 11 U.S.C. § 507 as amended by BAPCPA and to add the new priority included in the 2005 Act for claims for death or personal injury while the debtor was intoxicated. "Subtotal" and "Total" boxes have been added to the columns labeled "Amount Entitled to Priority" and "Amount Not Entitled to Priority" for statistical reporting purposes and to assist the individual debtor in completing the means test calculation under § 707(b)(2)(A)(i) of the Code.

Schedule H - Codebtors is amended to add specifics about community property jurisdictions in connection with the requirement to provide the name of any spouse of a debtor who resides or resided in a community property jurisdiction. This amendment also mirrors amendments made in 1997 to Official Form 7, the Statement of Financial Affairs, and will assure that these codebtors receive notice of the filing of the bankruptcy case. The form also is amended to

extend from six years to eight years the time period for which this information is reported pursuant to the 2005 amendments to § 727(a)(8) of the Code.

Schedule I - Current Income of Individual Debtor(s) is amended to require the income of a nondebtor spouse to be reported in cases filed under chapters 7 and 11 and to make it clear that "every" married debtor must provide income information for both spouses, unless the spouses are separated and a joint petition is not filed. The description of the income to be reported is revised to clarify that the purpose of this schedule is to obtain information about actual income on the date the bankruptcy case is filed and which a debtor reasonably expects in the future. This will help distinguish the information here from the debtor's "current monthly income" as defined in § 101(10A), which was added to the Code by BAPCPA in 2005. Line numbers have been added to assist the debtor in calculating and reporting totals. A new subtotal line for income from sources other than as an employee and a new "average monthly income" line will enable this form to be used in conjunction with Schedule J to satisfy the requirements of § 521(a)(1)(B)(v), which was added to the Code by BAPCPA. New statistical reporting requirements in 28 U.S.C. § 159 also require "average monthly income." In addition, the form is revised to provide the statement concerning any anticipated increase or decrease in income required in § 521(a)(1)(B)(vi), also added to the Code in 2005.

Schedule J - Current Expenditures of Individual Debtor(s). In conjunction with amendments to Schedule I, the form is amended to provide for reporting the debtor's actual "average monthly expenses," as required by 28 U.S.C. § 159 and a statement of monthly net income, itemized to show how the amount is calculated, as required by § 522(a)(1)(B)(v), which was added to the Code by BAPCPA in 2005. In addition, line numbers have been inserted and the description of expenses revised to make it clear than the purpose of this shcedule is to obtain information about a debtor's actual and reasonably forseeable expenses on the date the bankruptcy case is filed. A direction has been added to require the debtor to report any increase or decrease in expenses anticipated to occur within the year following the filing of the document, as required by § 521(a)(1)(B)(vi), which also was added to the Code in 2005.

Declaration Concerning Debtor's Schedules. The declaration by individual or joint debtors is amended to require the debtor to state the total number of pages being verified as the total number of "sheets"in the schedules "plus 2," to take account of the addition to the form of the Statistical Summary of Certain Liabilities and Related Data. The declaration and signature of any non-attorney bankruptcy petition preparer is amended to include material mandated by § 110 of the Code as amended in 2005.

Official Form 7
(12/08)

UNITED STATES BANKRUPTCY COURT

_____ **DISTRICT OF** _____

In re: _____, Case No. _____
Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs. Do not include the name or address of a minor child in this statement. Indicate payments, transfers and the like to minor children by stating "a minor child." See 11 U.S.C. § 112. If "a minor child" is stated, include the name, address, and legal relationship to the minor child of a person described in Fed. R. Bankr. P. 1007(m).

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed full-time or part-time. An individual debtor also may be "in business" for the purpose of this form if the debtor engages in a trade, business, or other activity, other than as an employee, to supplement income from the debtor's primary employment.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business, including part-time activities either as an employee or in independent trade or business, from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

3. Payments to creditors

Complete a. or b., as appropriate, and c.

None ☐ a. *Individual or joint debtor(s) with primarily consumer debts:* List all payments on loans, installment purchases of goods or services, and other debts to any creditor made within **90 days** immediately preceding the commencement of this case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $600. Indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and creditor counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. *Debtor whose debts are not primarily consumer debts:* List each payment or other transfer to any creditor made within **90** days immediately preceding the commencement of the case unless the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000. If the debtor is an individual, indicate with an asterisk (*) any payments that were made to a creditor on account of a domestic support obligation or as part of an alternative repayment schedule under a plan by an approved nonprofit budgeting and creditor counseling agency. (Married debtors filing under chapter 12 or chapter 13 must include payments and other transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS/ TRANSFERS	AMOUNT PAID OR VALUE OF TRANSFERS	AMOUNT STILL OWING

None ☐

c. *All debtors:* List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐

a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐

b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

5. Repossessions, foreclosures and returns

None ☐

List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

6. Assignments and receiverships

None ☐

a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐

b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.).

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE Of PROPERTY

7. Gifts

None ☐

List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

8. Losses

None ☐

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYER IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

10. Other transfers

None ☐ a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

None ☐ b. List all property transferred by the debtor within **ten years** immediately preceding the commencement of this case to a self-settled trust or similar device of which the debtor is a beneficiary.

NAME OF TRUST OR OTHER DEVICE	DATE(S) OF TRANSFER(S)	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY OR DEBTOR'S INTEREST IN PROPERTY

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

12. Safe deposit boxes

None ☐

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

13. Setoffs

None ☐

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

14. Property held for another person

None ☐

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐

If debtor has moved within **three years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within **eight years** immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

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17. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law.

None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

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18 . Nature, location and name of business

None ☐ a. *If the debtor is an individual*, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession, or other activity either full- or part-time within **six years** immediately preceding the commencement of this case, or in

which the debtor owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within **six years** immediately preceding the commencement of this case.

NAME	LAST FOUR DIGITS OF SOC. SEC. OR OTHER INDIVIDUAL TAXPAYER I.D. NO. (ITIN)/ COMPLETE EIN	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within **six years** immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor, or self-employed in a trade, profession, or other activity, either full- or part-time.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within six years immediately preceding the commencement of this case. A debtor who has not been in business within those six years should go directly to the signature page.)*

19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued by the debtor within **two years** immediately preceding the commencement of this case.

NAME AND ADDRESS	DATE ISSUED

20. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

21 . Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

22 . Former partners, officers, directors and shareholders

None ☐

a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐

b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

23 . Withdrawals from a partnership or distributions by a corporation

None ☐

If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

24. Tax Consolidation Group.

None ☐

If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within **six years** immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER IDENTIFICATION NUMBER (EIN)

25. Pension Funds.

None ☐

If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within **six years** immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER IDENTIFICATION NUMBER (EIN)

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____ continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

_____ _____
Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer Social Security No.(Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs this document.

_____

_____
Address

X _____ _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 18 U.S.C. § 156.

Form 7

COMMITTEE NOTE

The form is amended in several ways to reflect changes in the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109 - 8, 119 Stat. 23 (April 20, 2005). A new sentence in the introduction advises the debtor not to disclose the name and address of any minor child in conformity with § 112, which was added to the Code by the 2005 Act. In addition, the form is amended to add to the reference to Rule 1007(m) with respect to a minor child a direction to include for noticing purposes the name, address, and legal relationship to the child of "a person described" in that rule. Rule 1007(m) requires the person named to be someone on whom process would be served in an adversary proceeding against the child.

The definition of "in business" is amended in the introductory section and in Question 1 and Question 18 to clarify that various part-time activities can result in the debtor being "in business" for purposes of the form.

Question 1 is amended to specify that, in addition to the income from the debtor's primary employment, the debtor must include income from part-time activities either as an employee or from self-employment. The debtor now also will report the source of all income from employment or operation of a business, even if there is only one source, in order to assist the trustee in reviewing the pay stubs, etc., filed by the debtor in the case.

Question 3 is amended to accommodate amendments to § 547(c) of the Code enacted in 2005 which exempt from recovery by the trustee payments by a debtor for a domestic support obligation or as part of an alternative repayment schedule negotiated by an approved nonprofit budgeting and credit counseling agency. In addition, Question 3 now requires a debtor with primarily non-consumer debts to report only those transfers that aggregate more than $5,000 to any creditor in the 90-day period prior to the filing of the petition, as a result of the addition of § 547(c)(9) to the Code in 2005. In addition, the language of the question is revised for clarity.

In Question 10, the extension of the reachback period for transfers from one year to two years reflects the 2005 amendment to § 548(a)(1) of the Code to permit a trustee to avoid a fraudulent transfer made by the debtor within two years before the date of the filing of the petition. Question 10 also is amended to implement new § 548(e) added to the Code in 2005 to require the debtor to disclose all transfers to any self-settled asset protection trust within the ten years before the filing of the petition.

Question 15 is amended to extend from two years to three years the prepetition time period for which the debtor must disclose the addresses of all premises occupied by the debtor. This information will assist the trustee, the United States trustee, and the court to ascertain whether any homestead exemption asserted by the debtor is properly claimed under § 522(b)(3)(A) as amended, and §§ 522(p) and (q) as added to the Code in 2005.

The form also is amended to extend from six years to eight years the period before the filing of the petition concerning which the debtor is required to disclose the name of the debtor's spouse or of any former spouse who resides or resided with the debtor in a community property state. In addition, the certification by a non-attorney bankruptcy petition preparer is renamed a "declaration" and is amended to include material mandated by 11 U.S.C. § 110 as amended by the 2005 Act.

Form 8
(12/08)

United States Bankruptcy Court
_____ District Of _____

In re _____,
Debtor

Case No. _____
Chapter 7

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

☐ I have filed a schedule of assets and liabilities which includes debts secured by property of the estate.
☐ I have filed a schedule of executory contracts and unexpired leases which includes personal property subject to an unexpired lease.
☐ I intend to do the following with respect to the property of the estate which secures those debts or is subject to a lease:

Description of Secured Property	Creditor's Name	Property will be Surrendered	Property is claimed as exempt	Property will be redeemed pursuant to 11 U.S.C. § 722	Debt will be reaffirmed pursuant to 11 U.S.C. § 524(c)

Description of Leased Property	Lessor's Name	Lease will be assumed pursuant to 11 U.S.C. § 362(h)(1)(A)

Date: _____

_____
Signature of Debtor

DECLARATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No. (Required under 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person or partner who signs this document.

_____

_____
Address

X_____
Signature of Bankruptcy Petition Preparer

Date _____

Names and Social Security Numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

COMMITTEE NOTE

The form is amended to conform to § 362(h), which was added to the Code, and § 521(a)(2), which was amended, by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), by adding a section covering personal property subject to an unexpired lease and an option labeled "lease will be assumed pursuant to 11 U.S.C. § 362(h)(1)(A)" to the choices a debtor may make. The certification by a non-attorney bankruptcy petition preparer in the form is renamed a "declaration" and is amended to include material mandated by the 2005 amendments to § 110 of the Code.

FORM B9A (Chapter 7 Individual or Joint Debtor No Asset Case (12/08))

UNITED STATES BANKRUPTCY COURT _____ **District of** _____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your Rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address):	
Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)

See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.

Or

The presumption of abuse arises.

Or

Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
Telephone number:	Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9A (12/08)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727 (a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9B (Chapter 7 Corporation/Partnership No Asset Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your Rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address): Telephone number:
Attorney for Debtor(s) (name and address): Telephone number:	

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Do Not File a Proof of Claim at This Time" on the reverse side.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9B (12/08)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim. If this notice is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9C (Chapter 7 Individual or Joint Debtor Asset Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your Rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address):	
Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Presumption of Abuse under 11 U.S.C. § 707(b)
See "Presumption of Abuse" on the reverse side.

Depending on the documents filed with the petition, one of the following statements will appear.

The presumption of abuse does not arise.
Or
The presumption of abuse arises.
Or
Insufficient information has been filed to date to permit the clerk to make any determination concerning the presumption of abuse. If more complete information, when filed, shows that the presumption has arisen, creditors will be notified.

Deadlines:
Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
For all creditors (except a governmental unit): For a governmental unit:

Foreign Creditors:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:
In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

EXPLANATIONS

Form B9C (12/08)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727 (a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objections by the "Deadline to Object to Exemptions" listed on the front side.
Presumption of Abuse	If the presumption of abuse arises, creditors may have the right to file a motion to dismiss the case under § 707(b) of the Bankruptcy Code. The debtor may rebut the presumption by showing special circumstances.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9D (Chapter 7 Corporation/Partnership Asset Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 7 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your Rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

For all creditors (except a governmental unit): For a governmental unit:

Foreign Creditors:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: Telephone number:	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9D (12/08)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under Chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid, you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9E (Chapter 11 Individual or Joint Debtor Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:
Notice of deadline will be sent at a later time.

Foreign Creditors
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9E (12/08)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9E (ALT.) (Chapter 11 Individual or Joint Debtor Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit): For a governmental unit:

Foreign Creditors:
A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9E(ALT) (12/08)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). Unless the court orders otherwise, however, the discharge will not be effective until completion of all payments under the plan. A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141 (d) (3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9F (Chapter 11 Corporation/Partnership Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address):	Case Number:
	Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names): Telephone number:	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

Notice of deadline will be sent at a later time.

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office:	**For the Court:**
	Clerk of the Bankruptcy Court:
Telephone number:	
Hours Open:	Date:

EXPLANATIONS

Form B9F (12/08)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan. The court has not yet set a deadline to file a Proof of Claim. If a deadline is set, you will be sent another notice. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9F (ALT) (Chapter 11 Corporation/Partnership Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____(date) and was converted to a case under chapter 11 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Attorney for Debtor(s) (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadline to File a Proof of Claim

Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline:

For all creditors (except a governmental unit): For a governmental unit:

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9F ALT (12/08)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under Chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice. The court, after notice and a hearing, may order that the United States trustee not convene the meeting if the debtor has filed a plan for which the debtor solicited acceptances before filing the case.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you filed a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File Proof of Claim" listed on the front side, or you might not be paid any money on your claim and may be unable to vote on a plan. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141 (d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141 (d) (6) (A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9G (Chapter 12 Individual or Joint Debtor Family Farmer or Family Fisherman (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of** _____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____(date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____on _____ (date) and was converted to a case under chapter 12 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9G (12/08)

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9H (Chapter 12 Corporation/Partnership Family Farmer or Family Fisherman (12/08))

UNITED STATES BANKRUPTCY COURT _____ **District of** _____

Notice of
Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor [corporation] *or* [partnership] listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor [corporation] *or* [partnership] listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors(except a governmental unit): For a governmental unit:

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____ Time:_____ Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9H (12/08)

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under Chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers and family fishermen to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; and starting or continuing lawsuits or foreclosures. Under certain circumstances, the stay may be limited in duration or not exist at all, although the debtor may have the right to request the court to extend or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor's representative must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2), (4), or (6), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that Deadline.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

FORM B9I (Chapter 13 Case (12/08))

UNITED STATES BANKRUPTCY COURT_____ **District of**_____

Notice of
Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter_____
on _____ (date) and was converted to a case under chapter 13 on_____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below.
NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side for Important Explanations

Debtor(s) (name(s) and address): Telephone number:	Case Number: Last four digits of Social Security or Individual Taxpayer ID (ITIN) No(s)./Complete EIN:
All other names used by the Debtor(s) in the last 8 years (include married, maiden, and trade names):	Bankruptcy Trustee (name and address):
Attorney for Debtor(s) (name and address): Telephone number:	Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A. M. ( ) P. M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):

For a governmental unit (except as otherwise provided in Fed . R. Bankr. P. 3002(c)(1)):

Foreign Creditors

A creditor to whom this notice is sent at a foreign address should read the information under "Claims" on the reverse side.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date:_____Time:_____Location:_____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

Address of the Bankruptcy Clerk's Office: **Telephone number:**	**For the Court:** Clerk of the Bankruptcy Court:
Hours Open:	Date:

EXPLANATIONS

Form B9I (12/08)

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under Chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. Consult a lawyer to determine your rights in this case.
Creditors Generally May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail, or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to exceed or impose a stay.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time, and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. A secured creditor retains rights in its collateral regardless of whether that creditor files a Proof of Claim. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim from other assets in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor. Filing a Proof of Claim submits the creditor to the jurisdiction of the bankruptcy court, with consequences a lawyer can explain. For example, a secured creditor who files a Proof of Claim may surrender important nonmonetary rights, including the right to a jury trial. **Filing Deadline for a Foreign Creditor:** The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523 (a) (2) or (4), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Foreign Creditors	Consult a lawyer familiar with United States bankruptcy law if you have any questions regarding your rights in this case.

Refer To Other Side For Important Deadlines and Notices

COMMITTEE NOTE

The form is amended in a variety of ways to implement the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005). All versions of the form are amended to advise creditors to consult an attorney concerning what rights they may have in the specific case. All versions of the form also are amended to provide to creditors with foreign addresses information about filing claims and to advise those creditors to consult a lawyer familiar with United States bankruptcy law regarding any questions they may have about their rights in a particular case. These amendments implement § 1514, which was added to the Code in 2005.

Forms 9A and 9C are amended to include a box in which the clerk can notify creditors in a chapter 7 case filed by an individual with primarily consumer debts if the presumption of abuse has arisen under § 707(b) of the Code as amended in 2005. Under § 342(d) of the Code, the clerk has a duty to notify creditors concerning the presumption within ten days of the filing of the petition. In cases in which the debtor does not file Official Form 22A with the petition, the forms provide for the clerk to state that insufficient information has been filed, and to inform creditors that if later-filed information indicates that the presumption arises, creditors will be sent another notice. Forms 9G and 9H are amended to add "family fishermen" to the notices used in chapter 12 cases, in conformity with the 2005 amendments to the Code extending the provisions of chapter 12 to family fishermen.

In cases involving serial filers (debtors who have filed more than one case within a specified period), the automatic stay provided by § 362(a) of the Code as amended in 2005 may not apply or may be limited in duration, unless the stay is extended or imposed by court order. The form contains a general statement alerting debtors to this possibility.

Section 1514, added to the Code in 2005, also requires that a secured creditor with a foreign address be advised whether the creditor is required to file a proof of claim, and Forms 9B, 9D, 9E, 9E (Alt.), 9F, 9F (Alt.), 9G, 9H, and 9I are amended to include general information addressing that question. Forms 9E, 9E (Alt.), 9F, and 9F (Alt.) also are amended to inform creditors that in a case in which the debtor has filed a plan for which it has solicited acceptances before filing the case, the court may, after notice and a hearing, order that the United States trustee not convene a meeting of creditors.

Forms 9E and 9E (Alt.) are amended to state that, unless the court orders otherwise, an individual chapter 11 debtor's discharge is not effective until completion of all payments under the plan, as provided in § 1141(d)(5) which was added to the Code in 2005. Forms 9F and 9F (Alt.) are amended to include a deadline to file a complaint to determine the dischargeability of a debt, in conformity with § 1141(d)(6), which also was added to the Code in 2005.

Form 9I is amended to include a deadline to file a complaint to determine the dischargeability of certain debts. This amendment implements a 2005 amendment to § 1328(a) of the Code.

In addition, all versions of the form are amended to provide to the public only the last four digits of any individual debtor's taxpayer identification number. This amendment implements Rule 9037.

FORM B10 (Official Form 10) (12/08)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____	**PROOF OF CLAIM**
Name of Debtor:	Case Number:

NOTE: *This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Name and address where notices should be sent:

Telephone number:

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:_____ (*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $_____

If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.

If all or part of your claim is entitled to priority, complete item 5.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.

2. Basis for Claim: _____
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: _____

3a. Debtor may have scheduled account as: _____
(See instruction #3a on reverse side.)

4. Secured Claim (See instruction #4 on reverse side.)
Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
Describe:

Value of Property:$_____ **Annual Interest Rate**___%

Amount of arrearage and other charges as of time case filed included in secured claim,

if any: $_____ **Basis for perfection:** _____

Amount of Secured Claim: $_____ **Amount Unsecured:** $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $10,000*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier – 11 U.S.C. §507 (a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ Up to $2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

**Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.

7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements or running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (*See definition of "redacted" on reverse side.*)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

Date:	**Signature:** The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from notice address above. Attach copy of power of attorney, if any.	**FOR COURT USE ONLY**

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, there may be exceptions to these general rules.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the bankruptcy debtor's name, and the bankruptcy case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is located at the top of the notice.

Creditor's Name and Address:
Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. **Amount of Claim as of Date Case Filed:**
State the total amount owed to the creditor on the date of the Bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. **Basis for Claim:**
State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card.

3. **Last Four Digits of Any Number by Which Creditor Identifies Debtor:**
State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:
Use this space to report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

4. **Secured Claim:**
Check the appropriate box and provide the requested information if the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See DEFINITIONS, below.) State the type and the value of property that secures the claim, attach copies of lien documentation, and state annual interest rate and the amount past due on the claim as of the date of the bankruptcy filing.

5. **Amount of Claim Entitled to Priority Under 11 U.S.C. §507(a).**
If any portion of your claim falls in one or more of the listed categories, check the appropriate box(es) and state the amount entitled to priority. (See DEFINITIONS, below.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. **Credits:**
An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. **Documents:**
Attach to this proof of claim form redacted copies documenting the existence of the debt and of any lien securing the debt. You may also attach a summary. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary. FRBP 3001(c) and (d). Do not send original documents, as attachments may be destroyed after scanning.

Date and Signature:
The person filing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2), authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. Attach a complete copy of any power of attorney. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS

Debtor
A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor
A creditor is the person, corporation, or other entity owed a debt by the debtor on the date of the bankruptcy filing.

Claim
A claim is the creditor's right to receive payment on a debt that was owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim
A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. §506(a)
A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim
An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. §507(a)
Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted
A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor should redact and use only the last four digits of any social security, individual's tax identification, or financial account number, all but the initials of a minor's name and only the year of any person's date of birth.

Evidence of Perfection
Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

Attach no more than 25 pages of relevant excerpts that support the claim, including any summary. FRBP 3001(c). Attach no more than 5 pages of relevant excerpts of evidence of perfection, including any summary. FRBP 3001(d).

INFORMATION

Acknowledgment of Filing of Claim
To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim
Certain entitles are in the business of purchasing claims for an amount less than the fact value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.), and any applicable orders of the bankruptcy court.

COMMITTEE NOTE

The form is amended to conform to changes in the priority afforded the claims of certain creditors in § 507(a) of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

In addition, the form and its instructions are amended in several respects based on the experiences of creditors and trustees in using it and on the technological changes that have occurred in the courts' processing of claims. A definition of the word "redacted" has been added in conformity with Rule 9037.

The creditor now has a space in which to provide a separate payment address if different from the creditor's address for receiving notices in the case. The checkboxes for indicating that the creditor's address provided on the proof of claim is a new address, and that the creditor never received any notices from the court in the case have been deleted. The computer systems now used by the courts make it unnecessary for a creditor to "flag" a new address or call attention to the fact that the creditor is making its first appearance in the case. In place of the deleted items is a new checkbox to be used when a debtor or a trustee files a proof of claim for a creditor; it will alert the clerk to send the notice required by Rule 3004. The box for indicating whether the claim replaces a previously filed claim also has been deleted as no longer necessary in light of the 2005 amendments to Rules 3004 and 3005. The creditor simply will amend the claim filed by the other party.

Requests for the creditor to state the date on which the debt was incurred and the date on which any court judgment concerning the debt was obtained have been deleted, based on reports from trustees that they rely on the documents supporting the claim for this information. The checkboxes for stating the basis for the creditor's claim have been replaced with a blank in which the creditor is to provide this information. Examples of the most common categories, based on the former checkboxes, can be found in the instructions on the form. The request to state the account number by which the creditor identifies the debtor has been moved to paragraph 3 of the form and has been revised to request only the last four digits of the number, in conformity with Rule 9037. In addition, a new paragraph 3a gives the creditor a place to notify the trustee and the court of any change in the creditor's name, or that the claim has been transferred, or to provide any other information to clarify a difference between the proof of claim and the creditor's claim as scheduled by the debtor.

The adjective "total" is deleted from the sections of the form where the creditor states the amount of the claim and the creditor now simply reports the amount of the claim. If the claim is a general unsecured claim, no further details are stated on the form, although a creditor still must attach a copy of any writing on which the claim is based, as required by Rule 3001(c), and must attach a statement itemizing any interest or other charges (in addition to the principal) that are included in the claim. If the claim or any part of it is secured or entitled to priority under § 507(a) of the Code, the creditor is directed to provide details in the appropriate sections of the form. The creditor now states the amount to be afforded priority only once, in the section of the form designated for describing the specific priority being asserted. The introductory language in the section where the creditor describes any priority to which it is entitled has been revised for clarity. The word "collateral" has been replaced with the less colloquial and more accurate phrase "lien on property" throughout the form.

Information about obtaining acknowledgment from the court of the filing of the proof of claim is revised and moved to a new section on the reverse side called "Information." This new section also alerts a creditor to the possibility that it may be approached about selling its claim, advises that the court has no role in any such solicitations, and states that a creditor is under no obligation to accept any offer to purchase its claim. A new instruction is added about signing a proof of claim. This instruction includes citations to Rules 9011 and 5005(a)(2) concerning signature requirements in an electronic filing environment.

Finally, all of the definitions and instructions on the reverse side of the form are amended generally to reflect the deletions, additions, and other changes made on page 1. These include a reminder to the creditor to keep the court informed of any changes in its address. The instructions now appear at the top of the page, and the text is revised both to reflect the substantive changes to the form and to improve the clarity and style of this explanatory material.

Form 16A
(12/08)

Form 16A. CAPTION (FULL)

United States Bankruptcy Court

_____ District Of _____

In re _____,	)	
[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]	)	
Debtor	)	**Case No.** _____
Address _____	)	
_____	)	**Chapter** _____
Last four digits of Social Security or Individual Taxpayer Identification (ITIN) No(s).,(if any): _____	)	
_____	)	
Employer's Tax Identification (EIN) No(s).(if any): ___	)	
_____	)	

[Designation of Character of Paper]

Form 16A

COMMITTEE NOTE

The form is amended to require that the title of the case include all names used by the debtor within the last eight years in conformity with § 727(a)(8) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), extending from six years to eight years the period during which a debtor is barred from receiving successive discharges. In conformity with Rule 9037, the filer is directed to provide only the last four digits of any individual debtor's taxpayer identification number.

Form 18
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____,) *[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years.]* Debtor	) Case No. _____
Address _____ _____	) Chapter 7
Last four digits of Social Security or other Individual Taxpayer Identification No(s)(if any).: _____ _____ Employer's Tax Identification No(s).(EIN) [if any]: _____ _____	)

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge, **IT IS ORDERED:** The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Dated: _____

BY THE COURT

_____

United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged.

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts incurred to pay nondischargeable taxes;

c. Debts that are domestic support obligations;

d. Debts for most student loans;

e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;

g. Some debts which were not properly listed by the debtor;

h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;

i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.

j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans.

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

COMMITTEE NOTE

The form is amended to require that the title of the case include all names used by the debtor within the eight years prior to the filing of the petition in the case in conformity with § 727(a)(8) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), extending from six years to eight years the period during which a debtor is barred from receiving successive discharges. The explanation part of the form is amended to include additional types of debts that are not discharged under § 523(a) as amended in 2005 and to revise certain terminology in conformity with provisions of the 2005 Act. In conformity with rule 9037 and Official Form 16A, the caption also is amended to provide only the last four digits of any individual debtor's taxpayer identification number.

Form 19A
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (11 U.S.C. § 110)

I declare under penalty of perjury that:

(1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110;
(2) I prepared the accompanying document for compensation and have provided the debtor with a copy of that document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342 (b); and
(3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

If the bankruptcy petition preparer is not an individual, state the name, address, and social security number of the officer, principal, responsible person or partner who signs this document.

_____
Social Security No.

_____

_____
Address

X _____ _____
Signature of Bankruptcy Petition Preparer Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 19A

COMMITTEE NOTE

The certification by a non-attorney bankruptcy petition preparer in this form is renamed a "declaration" and is amended to include material mandated by amendments to § 110 of the Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

Form 19B
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

NOTICE TO DEBTOR BY NON-ATTORNEY BANKRUPTCY PETITION PREPARER
[Must be filed with any document prepared by a bankruptcy petition preparer.]

I am a bankruptcy petition preparer. I am not an attorney and may not practice law or give legal advice. Before preparing any document for filing as defined in § 110(a)(2) of the Bankruptcy Code or accepting any fees, I am required by law to provide you with this notice concerning bankruptcy petition preparers. Under the law, § 110 of the Bankruptcy Code (11 U.S.C. § 110), I am forbidden to offer you any legal advice, including advice about any of the following:

- whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- whether commencing a case under chapter 7, 11, 12, or 13 is appropriate;
- whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- whether you will be able to retain your home, car, or other property after commencing a case under the Bankruptcy Code;
- concerning the tax consequences of a case brought under the Bankruptcy Code;
- concerning the dischargeability of tax claims;
- whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;
- concerning how to characterize the nature of your interests in property or your debts; or
- concerning bankruptcy procedures and rights.

[The notice may provide additional examples of legal advice that a bankruptcy petition preparer is not authorized to give.]

In addition, under 11 U.S.C. § 110(h), the Supreme Court or the Judicial Conference of the United States may promulgate rules or guidelines setting a maximum allowable fee chargeable by a bankruptcy petition preparer. As required by law, I have notified you of the maximum amount, if any, before preparing any document for filing or accepting any fee from you.

_____ _____
Signature of Debtor Date Joint Debtor (if any) Date
[In a joint case, both spouses must sign.]

Form 19B Cont.
(10/05)

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (*See* 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

_____
Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer

_____
Social Security No.
(Required by 11 U.S.C. § 110.)

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social security number of the officer, principal, responsible person, or partner who signs this document.

_____

_____
Address

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

Form 19B

COMMITTEE NOTE

This form is new. It contains the notice a non-attorney bankruptcy petition preparer is required to give to a debtor under § 110 of the Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005). The notice states, in language mandated in the 2005 Act, that the bankruptcy petition preparer is not an attorney and must not give legal advice. The form includes examples of advice a bankruptcy petition preparer may not give that are take from § 110(e)(2), which also was added to the Code in 2005. The notice must be signed by the debtor and by the bankruptcy petition preparer and filed with any document for filing prepared by the bankruptcy petition preparer.

Official Form 21
(12/08)

STATEMENT OF SOCIAL SECURITY NUMBER OR INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN)

[*Caption as in Form 16A.*]

STATEMENT OF SOCIAL SECURITY NUMBER(S)
(or other Individual Taxpayer Identification (ITIN) Number(s))

1.Name of Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
☐ Debtor does not have a Social Security Number but has an Individual Taxpayer Identification Number (ITIN), and it is: _____.
(If more than one, state all.)
☐ Debtor does not have either a Social Security Number or an Individual Taxpayer I.D. No.

2.Name of Joint Debtor (Last, First, Middle):_____
(Check the appropriate box and, if applicable, provide the required information.)

☐ Joint Debtor has a Social Security Number and it is: _ _ _-_ _-_ _ _ _
(If more than one, state all.)
☐ Joint Debtor does not have a Social Security Number but has an Individual Taxpayer Identification (ITIN) Number and it is: _____.
(If more than one, state all.)
☐ Joint Debtor does not have either a Social Security Number or an Individual Taxpayer I.D. No.

I declare under penalty of perjury that the foregoing is true and correct.

X _____
Signature of Debtor Date

X _____
Signature of Joint Debtor Date

**Joint debtors must provide information for both spouses.*
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form is amended to direct an individual debtor who does not have a Social Security number but has another government-issued individual taxpayer identification number to furnish that number to the court. In light of the new Rule 9037 which limits public disclosure to all but the last four digits of any individual taxpayer identification number, the amendment to this form will ensure that the court and creditors can properly identify a debtor who does not have a Social Security number.

Form B22A (Chapter 7) (12/08)
In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The presumption arises.**
☐ **The presumption does not arise.**
(Check the box as directed in Parts I, III, and VI of this statement.)

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedule I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1 If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

☐ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2 **Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed.

a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.**

b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.**

c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.**

d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**

	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	Column A Debtor's Income	Column B Spouse's Income
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the business expenses entered Line b as a deduction in Part V.**	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.**	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include amounts paid by the debtor's spouse if Column B is completed.	$	$

a.	Gross receipts	$
b.	Ordinary and necessary business expenses	$
c.	Business income	Subtract Line b from Line a

a.	Gross receipts	$
b.	Ordinary and necessary operating expenses	$
c.	Rent and other real property income	Subtract Line b from Line a

9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act | Debtor $ _____ | Spouse $ _____	$	$
10	**Income from all other sources.** If necessary, list additional sources on a separate page. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. a. $ b. $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	$	

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
20A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

20B **Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rental expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

$

21 **Local Standards: housing and utilities; adjustment.** if you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____

_____

_____ $

22 **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8.

☐ 0 ☐ 1 ☐ 2 or more.

Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) $

23 **Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)

☐ 1 ☐ 2 or more.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, First Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

$

24 **Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 23.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, Second Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

$

25 **Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

26 **Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.** $

27	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 44.**	$
29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service—such as cell phones, pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Expense Deductions under § 707(b)

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total: Add Lines a, b and c		$
35	**Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.		$
36	**Protection against family violence.** Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.		$
37	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**		$
38	**Education expenses for dependent children less than 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**		$
39	**Additional food and clothing expense.** Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**		$
40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).		$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40		$

Subpart C: Deductions for Debt Payment

42 Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

43 Other payments on secured claims. If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44 Payments on priority claims. Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $

45 Chapter 13 administrative expenses. If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

46 Total Deductions for Debt Payment. Enter the total of Lines 42 through 45. $

Subpart D: Total Deductions Allowed under § 707(b)(2)

47 Total of all deductions allowed under § 707(b)(2). Enter the total of Lines 33, 41, and 46. $

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$

52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $6,000** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $10,000.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $6,000, but not more than $10,000.** Complete the remainder of Part VI (Lines 53 through 55).	
53	**Enter the amount of your total non-priority unsecured debt**	$
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result.	$
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	

Part VII: ADDITIONAL EXPENSE CLAIMS

56 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

Part VIII: VERIFICATION

57 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Form B22B (Chapter 11) (12/08)
In re _____
Debtor(s)

Case Number: _____
(If known)

CHAPTER 11 STATEMENT OF CURRENT MONTHLY INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 11 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. CALCULATION OF CURRENT MONTHLY INCOME

1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married, not filing jointly. **Complete only Column A ("Debtor's Income") for Lines 2-10.** c. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Net income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do not enter a number less than zero. a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Net rental and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include contributions from the debtor's spouse if Column B is completed.	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ _____ Spouse $ _____	$	$
9	**Income from all other sources.** If necessary, list additional sources on a separate page. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. a. $ b. $ Total and enter on Line 9	$	$
10	**Subtotal of current monthly income.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total current monthly income.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II: VERIFICATION

12 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Form B22C (Chapter 13) (12/08)

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The applicable commitment period is 3 years.**
☐ **The applicable commitment period is 5 years.**
☐ **Disposable income is determined under § 1325(b)(3).**
☐ **Disposable income is not determined under § 1325(b)(3).**
(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual Chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

		Column A Debtor's Income	Column B Spouse's Income
1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.		
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include amounts paid by the debtor's spouse.	$	$
8	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act: Debtor $ _____ Spouse $ _____	$	$
9	**Income from all other sources.** Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. a. $ b. $	$	$
10	**Subtotal.** Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).	$	$
11	**Total.** If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.	$	

Part II. CALCULATION OF § 1325(b)(4) COMMITMENT PERIOD		
12	**Enter the amount from Line 11.**	
13	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. Otherwise, enter zero.	
14	**Subtract Line 13 from Line 12 and enter the result.**	
15	**Annualized current monthly income for § 1325(b)(4).** Multiply the amount from Line 14 by the number 12 and enter the result.	$
16	**Applicable median family income.** Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
17	**Application of § 1325(b)(4).** Check the applicable box and proceed as directed. ☐ **The amount on Line 15 is less than the amount on Line 16.** Check the box for "The applicable commitment period is 3 years" at the top of page 1 of this statement and continue with this statement. ☐ **The amount on Line 15 is not less than the amount on Line 16.** Check the box for "The applicable commitment period is 5 years" at the top of page 1 of this statement and continue with this statement.	

Part III. APPLICATION OF § 1325(b)(3) FOR DETERMINING DISPOSABLE INCOME		
18	**Enter the amount from Line 11.**	$
19	**Marital adjustment.** If you are married, but are not filing jointly with your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. If you are unmarried or married and filing jointly with your spouse, enter zero.	$
20	**Current monthly income for § 1325(b)(3).** Subtract Line 19 from Line 18 and enter the result.	
21	**Annualized current monthly income for § 1325(b)(3).** Multiply the amount from Line 20 by the number 12 and enter the result.	$
22	**Applicable median family income.** Enter the amount from Line 16.	$
23	**Application of § 1325(b)(3).** Check the applicable box and proceed as directed. ☐ **The amount on Line 21 is more than the amount on Line 22.** Check the box for "Disposable income is determined under § 1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement. ☐ **The amount on Line 21 is not more than the amount on Line 22.** Check the box for "Disposable income is not determined under § 1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement. **Do not complete Parts IV, V, or VI.**	

Part IV. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)		
	Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)	
24	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
25A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

25B **Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B. **Do not enter an amount less than zero.**

a.	IRS Housing and Utilities Standards; mortgage/rent Expense	$
b.	Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47	$
c.	Net mortgage/rental expense	Subtract Line b from Line a.

$

26 **Local Standards: housing and utilities; adjustment.** if you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____

_____

_____

$

27 **Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. ☐ 0 ☐ 1 ☐ 2 or more.

Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

$

28 **Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, First Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47	$
c.	Net ownership/lease expense for Vehicle 1	Subtract Line b from Line a.

$

29 **Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 28.

Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. **Do not enter an amount less than zero.**

a.	IRS Transportation Standards, Ownership Costs, Second Car	$
b.	Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47	$
c.	Net ownership/lease expense for Vehicle 2	Subtract Line b from Line a.

$

30 **Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**

$

31 **Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.**

$

32	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
33	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 49.**	$
34	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	
35	**Other Necessary Expenses: childcare.** Enter the average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
36	**Other Necessary Expenses: health care.** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance or health savings accounts listed in Line 39.**	$
37	**Other Necessary Expenses: telecommunication services.** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service—such as cell phones, pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
38	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 24 through 37.	$

Subpart B: Additional Expense Deductions under § 707(b)

Note: Do not include any expenses that you have listed in Lines 24-37

39	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total: Add Lines a, b, and c		$
40	**Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. **Do not include payments listed in Line 34.**		$
41	**Protection against family violence.** Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.		$
42	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**		$
43	**Education expenses for dependent children under 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**		$
44	**Additional food and clothing expense.** Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary.**		$
45	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).		$
46	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 39 through 45.		$

Subpart C: Deductions for Debt Payment

47 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

$

48 **Other payments on secured claims.** If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b, and c

$

49 **Payments on priority claims.** Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $

50 **Chapter 13 administrative expenses.** Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

51 **Total Deductions for Debt Payment.** Enter the total of Lines 47 through 50. $

Subpart D: Total Deductions Allowed under § 707(b)(2)

52 **Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 38, 46, and 51. $

Part V. DETERMINATION OF DISPOSABLE INCOME UNDER § 1325(b)(2)

53 **Total current monthly income.** Enter the amount from Line 20. $

54 **Support income.** Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, included in Line 7, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child. $

55 **Qualified retirement deductions.** Enter the monthly average of (a) all contributions or wage deductions made to qualified retirement plans, as specified in § 541(b)(7) and (b) all repayments of loans from retirement plans, as specified in § 362(b)(19). $

56 **Total of all deductions allowed under § 707(b)(2).** Enter the amount from Line 52. $

57 **Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, and 56 and enter the result. $

58	**Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 57 from Line 53 and enter the result.	$

Part VI: ADDITIONAL EXPENSE CLAIMS

59 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

Part VII: VERIFICATION

60 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

COMMITTEE NOTE

A. Overview

Among the changes introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 are interlocking provisions defining "current monthly income" and establishing a means test to determine whether relief under Chapter 7 should be presumed abusive. Current monthly income ("CMI") is defined in § 101(10A) of the Code, and the means test is set out in § 707(b)(2). These provisions have a variety of applications. In Chapter 7, if the debtor's CMI exceeds a defined level the debtor is subject to the means test, and § 707(b)(2)(C) specifically requires debtors to file a statement of CMI and calculations to determine the applicability of the means-test presumption. In Chapters 11 and 13, CMI provides the starting point for determining the disposable income that must be contributed to payment of unsecured creditors. Moreover, Chapter 13 debtors with CMI above defined levels are required by § 1325(b)(3) to complete the means test in order to determine the amount of their monthly disposable income; and, pursuant to § 1325(b)(4), the level of CMI determines the "applicable commitment period" over which projected disposable income must be paid to unsecured creditors.

To provide for the reporting and calculation of CMI and for the completion of the means test where required, three separate official forms have been created—one for Chapter 7, one for Chapter 11, and one for Chapter 13. This note first describes the calculation of CMI that is common to all three of the forms, next describes the means test as set out in the Chapter 7 and 13 forms, and finally addresses particular issues that are unique to each of the forms.

B. Calculation of CMI

Although Chapters 7, 11, and 13 use CMI for different purposes, the basic computation is the same in each. As defined in § 101(10A), CMI is the monthly average of certain income that the debtor (and in a joint case, the debtor's spouse) received in the six calendar months before the bankruptcy filing. The definition includes in this average (1) income from all sources, whether or not taxable, and (2) any amount paid by an entity other than the debtor (or the debtor's spouse in a joint case) on a regular basis for the household expenses of the debtor, the debtor's dependents, and (in a joint case) the debtor's spouse if not otherwise a dependent. At the same time, the definition excludes from the averaged income "benefits received under the Social Security Act" and certain payments to victims of terrorism, war crimes, and crimes against humanity.

Each form provides for reporting income items constituting CMI. The items are reported in a set of entry lines—Part II of the Chapter 7 form and Part I of the forms for Chapter 11 and Chapter 13—that include separate columns for reporting income of the debtor and of the debtor's spouse. The first of these entry lines includes a set of instructions and check boxes indicating when the "debtor's spouse" column must be completed. The instructions also direct the required averaging of reported income.

The subsequent entry lines specify several common types of income and are followed by a "catch-all" line for other income. The specific entry lines address: (a) gross wages; (b) business income; (c) rental income; (d) interest, dividends, and royalties; (e) pension and retirement income; (f) regular contributions to the debtor's household expenses; and (g) unemployment compensation. Gross wages (before taxes) are required to be entered. Consistent with usage in the Internal Revenue Manual and the American Community Survey of the Census Bureau, business and rental income is defined as gross receipts less ordinary and necessary expenses. Unemployment compensation is given special treatment. Because the federal government provides funding for state unemployment compensation under the Social Security Act, there may be a dispute about whether unemployment compensation is a "benefit received under the Social Security Act." The forms take no position on the merits of this argument, but give debtors the option of reporting unemployment compensation separately from the CMI calculation. This separate reporting allows parties in interest to determine the materiality of an exclusion of unemployment compensation and to challenge it. The forms provide for totaling the income lines.

C. The means test: deductions from current monthly income (CMI)

The means test operates by deducting from CMI defined allowances for living expenses and payment of secured and priority debt, leaving disposable income presumptively available to pay unsecured non-priority debt. These deductions from CMI under are set out in the Code at § 707(b)(2)(A)(ii)-(iv). The forms for Chapter 7 and Chapter 13 have identical sections (Parts V and III, respectively) for calculating these deductions. The calculations are divided into subparts reflecting three different kinds of allowed deductions.

1. Deductions under IRS standards

Subpart A deals with deductions from CMI, set out in § 707(b)(2)(A)(ii), for "the debtor's applicable monthly expense amounts specified under the National

Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." The forms provide entry lines for each of the specified expense deductions under the IRS standards, and instructions on the entry lines identify the website of the U.S. Trustee Program, where the relevant IRS allowances can be found. As with all of the deductions in § 707(b)(2)(A)(ii), deductions under the IRS standards are subject to the proviso that they not include "any payments for debts."

The IRS National Standards provide a single allowance for food, clothing, household supplies, personal care, and miscellany, depending on income and household size. The forms contain an entry line for the applicable allowance.

The IRS Local Standards provide one set of deductions for housing and utilities and another set for transportation expenses, with different amounts for different areas of the country, depending on the size of the debtor's family and the number of the debtor's vehicles. Each amount specified in the Local Standards is treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii) provides for deductions in the "amounts specified under the . . . Local Standards," the forms treat these amounts as allowed deductions. The forms again direct debtors to the website of the U.S. Trustee Program to obtain the appropriate allowances.

The Local Standards for housing and utilities, as published by the IRS for its internal purposes, present single amounts covering all housing expenses; however, for bankruptcy purposes, the IRS has separated these amounts into a non-mortgage component and a mortgage/rent component. The non-mortgage component covers a variety of expenses involved in maintaining a residence, such as utilities, repairs and maintenance. The mortgage/rent component covers the cost of acquiring the residence. For homeowners with mortgages, the mortgage/rent component involves debt payment, since the cost of a mortgage is part of the allowance. Accordingly, the forms require debtors to deduct from the mortgage/rent component their average monthly mortgage payment (including required payments for taxes and insurance), up to the full amount of the IRS mortgage/rent component, and instruct debtors that this average monthly payment is the one reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii). The forms allow debtors to challenge the appropriateness of this method of computing the Local Standards allowance for housing and utilities and to claim any additional housing allowance to which they contend they are entitled, but the forms require specification of the basis for such a contention.

The IRS issues Local Standards for transportation in two components for its internal purposes as well as for bankruptcy: one component covers vehicle operation/public transportation expense and the other ownership/lease expense. The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates, with debtors who do not operate vehicles being given a public transportation allowance. The instruction for this line item makes it clear that every debtor is thus entitled to some transportation expense allowance. No debt payment is involved in this allowance. The ownership/lease component, on the other hand, may involve debt payment. Accordingly, the forms require debtors to reduce the allowance for ownership/lease expense by the average monthly loan payment amount (principal and interest), up to the full amount of the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(a)(iii).

The IRS does not set out specific dollar allowances for "Other Necessary Expenses." Rather, it specifies a number of categories for such expenses, and describes the nature of the expenses that may be deducted in each of these categories. Section 707(b)(2)(a)(ii) allows a deduction for the debtor's actual expenses in these specified categories, subject to its requirement that payment of debt not be included. Several of the IRS categories deal with debt repayment and so are not included in the forms. Several other categories deal with expense items that are more expansively addressed by specific statutory allowances. Subpart A sets out the remaining categories of "Other Necessary Expenses" in individual entry lines. Instructions in these entry lines reflect limitations imposed by the IRS and the need to avoid inclusion of items deducted elsewhere on the forms.

Subpart A concludes with a subtotal of the deductions allowed under the IRS standards.

2. Additional statutory expense deductions

In addition to the expense deductions allowed under the IRS standards, the means test makes provision—in subclauses (I), (II), (IV), and (V) of § 707(b)(2)(A)(ii)—for six special expense deductions. Each of these additional expense items is set out on a separate entry line in Subpart B, introduced by an instruction that there should not be double counting of any expense already included in the IRS deductions. Contributions to tax-exempt charities provide another statutory expense deduction. Section 1325(b)(2)(A)(ii) expressly allows a deduction from CMI for such contributions (up to 15% of the debtor's gross income), and § 707(b)(1) provides that in considering whether a Chapter 7 filing is an abuse, the court may not take into consideration "whether a debtor . . .

continues to make [tax-exempt] charitable contributions." Accordingly, Subpart B also includes an entry line for charitable contributions. The subpart concludes with a subtotal of the additional statutory expense deductions.

3. Deductions for payment of debt

Subpart C deals with the means test's deductions from CMI for payment of secured and priority debt, as well as a deduction for administrative fees that would be incurred if the debtor paid debts through a Chapter 13 plan. In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines—one for payments that are contractually due during the 60 months following the bankruptcy filing, the other for amounts needed to retain necessary collateral securing debts in default. In each situation, the instructions for the entry lines require dividing the total payment amount by 60, as the statute directs. Priority debt, deductible pursuant to § 707(b)(2)(A)(iv), is treated on a single entry line, also requiring division by 60. The defined deduction for the expenses of administering a Chapter 13 plan is allowed by § 707(b)(2)(A)(ii)(III) only for debtors eligible for Chapter 13. The forms treat this deduction in an entry line requiring the eligible debtor to state the amount of the prospective Chapter 13 plan payment and multiply that payment amount by the percentage fee established for the debtor's district by the Executive Office for United States Trustees. The forms refer debtors to the website of the U.S. Trustee Program to obtain this percentage fee. The subpart concludes with a subtotal of debt payment deductions.

4. Total deductions

Finally, the forms direct that the subtotals from Subparts A, B, and C be added together to arrive at the total of allowed deductions from CMI under the means test.

5. Additional claimed deductions

The forms do not provide for means-test deductions from CMI for expenses in categories that are not specifically identified as "Other Necessary Expenses" in the Internal Revenue Manual. However, debtors may wish to claim expenses that do not fall within the categories listed as "Other Necessary Expenses" in the forms. Part VII of the Chapter 7 form and Part VI of the Chapter 13 form provide for such expenses to be identified and totaled. Although expenses listed in these sections are not deducted from CMI for purposes of the means-test calculation, the listing provides a basis for debtors to assert that these expenses should be deducted from CMI under § 707(b)(2)(A)(ii)(I), and that the results of the forms' calculation, therefore, should be modified.

D. The chapter-specific forms

1. Chapter 7

The Chapter 7 form has several unique aspects. The form includes, in the upper right corner of the first page, a check box directing the debtor to state whether or not the calculations required by the form result in a presumption of abuse. The debtor is not bound by this statement and may argue, in response to a motion brought under § 707(b)(1), that there should be no presumption despite the calculations required by the form. The check box is intended to give clerks of court a conspicuous indication of the cases for which they are required to provide notice of a presumption of abuse pursuant to § 342(d).

Part I implements the provision of § 707(b)(2)(D) that excludes certain disabled veterans from all means-testing, making it unnecessary to compute the CMI of such veterans. Debtors who declare under penalty of perjury that they are disabled veterans within the statutory definition are directed to verify their declaration in Part VII, to check the "no presumption" box at the beginning of the form, and to disregard the remaining parts of the form.

Part II computes CMI. Section 707(b)(7) prohibits a motion to dismiss based on the means test's presumption of abuse if the debtor's annualized CMI does not exceed a defined median state income. For this purpose, the statute directs that CMI of the debtor's spouse be combined with the debtor's CMI even if the debtor's spouse is not a joint debtor, unless the debtor declares under penalty of perjury that the spouses are legally separated or living separately other than for purposes of evading the means test. Accordingly, the calculation of CMI in Part II directs a computation of the CMI of the debtor's spouse not only in joint cases, but also in cases of married debtors who do not make the specified declaration, and the CMI of both spouses in these cases is combined for purposes of determining standing under § 707(b)(7).

Part III compares the debtor's CMI to the applicable state median income for purposes of § 707(b)(7). It then directs debtors whose income does not exceed the applicable median to verify the form, to check the "no presumption" box at the beginning of the form, and not to complete the remaining parts of the form. Debtors whose CMI does exceed the applicable state median are required to complete the remaining parts of the form.

Part IV adjusts the CMI of a married debtor, not filing jointly, whose spouse's CMI was combined with the debtor's for purposes of determining standing to assert the means-test presumption. The means test itself does not

charge a married debtor in a non-joint case with the income of the non-filing spouse, but rather only with contributions made by that spouse to the household expenses of the debtor or the debtor's dependents, as provided in the definition of CMI in § 101(10A). Accordingly, Part IV calls for the combined CMI of Part II to be reduced by the amount of the non-filing spouse's income that was not contributed to the household expenses of the debtor or the debtor's dependents.

Part V provides for a calculation of the means test's deductions from the debtor's CMI, as described above.

Part VI provides for a determination of whether the debtor's CMI, less the allowed deductions, gives rise to a presumption of abuse under § 707(b)(2)(A). Depending on the outcome of this determination, the debtor is directed to check the appropriate box at the beginning of the form and to sign the verification in Part VIII. Part VII allows the debtor to claim additional deductions, as discussed above.

2. Chapter 11

The Chapter 11 form is the simplest of the three, since the means-test deductions of
§ 707(b)(2) are not employed in determining the extent of an individual Chapter 11 debtor's disposable income. Section 1129(a)(15) requires payments of disposable income "as defined in section 1325(b)(2)," and that paragraph allows calculation of disposable income under judicially-determined standards, rather than pursuant to the means-test deductions, specified for higher income Chapter 13 debtors by § 1325(b)(3). However, § 1325(b)(2) does require that CMI be used as the starting point in the judicial determination of disposable income, and so the Chapter 11 form requires this calculation (in Part I of the form), as described above, together with a verification (in Part II).

3. Chapter 13

Like the Chapter 7 form, the form for Chapter 13 debtors contains a number of special provisions. The upper right corner of the first page includes check boxes requiring the debtor to state whether, under the calculations required by the statement, the applicable commitment period under § 1325(b)(4) is three years or five years and whether § 1325(b)(3) requires the means-test deductions to be used in determining the debtor's disposable income. The check box is intended to inform standing trustees and other interested parties about these items, but does not prevent the debtor from arguing that the calculations required by the form do not accurately reflect the debtor's disposable income.

Part I is a report of income to be used for determining CMI. Section 1325(b)(4) imposes a five-year applicable commitment period—rather than a three-year period—if the debtor's annualized CMI is not less than a defined median state income. For this purpose, as under § 707(b)(4), the statute requires that the CMI of the debtor's spouse to be combined with the debtor's CMI, and no exception exists for spouses who are legally separated or living separately. Accordingly, the report of income in Part I directs a combined reporting of the income of both spouses in all cases of married debtors.

Part II computes the applicable commitment period by annualizing the income calculated in Part I and comparing it to the applicable state median. The form allows debtors to contend that the income of a non-filing spouse should not be treated as CMI and permits debtors to claim a deduction for any income of a non-filing spouse to the extent that this income was not contributed to the household expenses of the debtor or the debtor's dependents. The debtor is directed to check the appropriate box at the beginning of the form, stating the applicable commitment period.

Part III compares the debtor's CMI to the applicable state median, allowing a determination of whether the means-test deductions must be used, pursuant to § 1325(b)(3), in calculating disposable income. For this purpose, since § 1325(b)(3) does not provide for including the income of the debtor's spouse, the form directs a deduction of the income of a non-filing spouse that is not contributed to the household expenses of the debtor or the debtor's dependents. Again, the debtor is directed to check the appropriate box at the beginning of the form, indicating whether the means-test deductions are applicable. If so, the debtor is directed to complete the remainder of the form. If not, the debtor is directed to complete the verification in Part VII but not complete the other parts of the form.

Part IV provides for calculation of the means-test deductions provided in § 707(b)(2), described above, as incorporated by § 1325(b)(3) for debtors with CMI above the applicable state median.

Part V provides for three adjustments required by special provisions affecting disposable income in Chapter 13. First, § 1325(b)(2) itself excludes from the CMI used in determining disposable income certain "child support payments, foster care payments, [and] disability payments for a dependent child." Because payments of this kind are included in the definition of CMI in § 101(10A), a line entry for deduction of these payments is provided. Second, a line entry is provided for deduction of contributions by the debtor to certain retirement plans, listed in § 541(b)(7)(B), since that provision states that such contributions "shall not constitute disposable income, as defined in section 1325(b)." Third, the same line

entry also allows a deduction from disposable income for payments on loans from retirement accounts that are excepted from the automatic stay by § 362(b)(19), since § 1322(f) provides that for a "loan described in section 362(b)(19) . . . any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. No specific statutory allowance for such a deduction exists, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

Part VI allows the debtor to claim additional deductions, as described above, and Part VII is the verification.

Form 23
(12/08)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor

Chapter _____

DEBTOR'S CERTIFICATION OF COMPLETION OF INSTRUCTIONAL COURSE CONCERNING PERSONAL FINANCIAL MANAGEMENT

Every individual debtor in a chapter 7 or chapter 13 case must file this certification. If a joint petition is filed, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that on _____ (Date), I completed an instructional course in personal financial management provided by _____, an approved personal financial
(Name of Provider)
management provider.

Certificate No. (if any): _____.

☐ I, _____, the debtor in the above-styled case, hereby
(Printed Name of Debtor)
certify that no personal financial management course is required because of *[Check the appropriate box.]*:

☐ Incapacity or disability, as defined in 11 U.S.C. § 109(h);
☐ Active military duty in a military combat zone; or
☐ Residence in a district in which the United States trustee (or bankruptcy administrator) has determined that the approved instructional courses are not adequate at this time to serve the additional individuals who would otherwise be required to complete such courses.

Signature of Debtor: _____

Date: _____

Instructions: Use this form only to certify whether you completed a course in personal financial management. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

Filing Deadlines: In a chapter 7 case, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

COMMITTEE NOTE

The form is new. Sections 727(a)(11) and 1328(g)(1), which were added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), require the debtor to complete an instructional course concerning personal financial management as a condition for receiving a discharge. The completed form will signal the clerk that this condition has been satisfied. Each individual debtor, including both spouses in a joint case, must file a separate certification and provide the certificate number of the certificate of completion issued to the debtor by the approved personal financial management counselor. Instructions are included which state the deadlines for filing the certification in chapter 7 and chapter 13 cases and remind the debtor that the form is not to be used for filing a certification of prepetition credit counseling.

Form 24
(12/08)

[Caption as described in Fed. R. Bankr. P. 7010 or 9004(b), as applicable.]

CERTIFICATION TO COURT OF APPEALS BY ALL PARTIES

A notice of appeal having been filed in the above-styled matter on _____*[Date]*, _____, _____, and _____, [*Names of all the appellants and all the appellees, if any]*, who are all the appellants [and all the appellees] hereby certify to the court under 28 U.S.C. § 158(d)(2)(A) that a circumstance specified in 28 U.S.C. § 158(d)(2) exists as stated below.

Leave to appeal in this matter [_] is [_] is not required under 28 U.S.C. § 158(a).

[If from a final judgment, order, or decree] This certification arises in an appeal from a final judgment, order, or decree of the United States Bankruptcy Court for the _____ District of _____ entered on _____*[Date]*.

[If from an interlocutory order or decree] This certification arises in an appeal from an interlocutory order or decree, and the parties hereby request leave to appeal as required by 28 U.S.C. § 158(a).

[The certification shall contain one or more of the following statements, as is appropriate to the circumstances.]

The judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States, or involves a matter of public importance.

Or

The judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

Or

An immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

[The parties may include or attach the information specified in Rule 8001(f)(3)(C).]

Signed: *[If there are more than two signatories, all must sign and provide the information requested below. Attach additional signed sheets if needed.]*

_____	_____
Attorney for Appellant (or Appellant, if not represented by an attorney)	Attorney for Appellant (or Appellant if not represented by an attorney)
_____	_____
Printed Name of Signer	Printed Name of Signer
_____	_____
_____	_____
Address	Address
_____	_____
Telephone No.	Telephone No.
_____	_____
Date	Date

Form 24

COMMITTEE NOTE

This form is new. Rule 8001, as amended in 2005, requires that any certification of an appeal, bankruptcy court judgment, order, or decree directly to the United States Court of Appeals by all the appellants and appellees (if any) acting jointly be filed on this form.

Form 25A
(12/08)

United States Bankruptcy Court

_____ District of _____

In re_____, Case No. _____

Debtor

Small Business Case under Chapter 11

[NAME OF PROPONENT]'S PLAN OF REORGANIZATION, DATED [INSERT DATE]

ARTICLE I
SUMMARY

This Plan of Reorganization (the "Plan") under chapter 11 of the Bankruptcy Code (the "Code") proposes to pay creditors of [insert the name of the debtor] (the "Debtor") from [specify sources of payment, such as an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income].

This Plan provides for _____ classes of secured claims; _____ classes of unsecured claims; and _____ classes of equity security holders. Unsecured creditors holding allowed claims will receive distributions, which the proponent of this Plan has valued at approximately __ cents on the dollar. This Plan also provides for the payment of administrative and priority claims [if payment is not in full on the effective date of this Plan with respect to any such claim (to the extent permitted by the Code or the claimant's agreement), identify such claim and briefly summarize the proposed treatment.]

All creditors and equity security holders should refer to Articles III through VI of this Plan for information regarding the precise treatment of their claim. A disclosure statement that provides more detailed information regarding this Plan and the rights of creditors and equity security holders has been circulated with this Plan. **Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one.)**

ARTICLE II
CLASSIFICATION OF CLAIMS AND INTERESTS

2.01 Class 1. All allowed claims entitled to priority under § 507 of the Code (except administrative expense claims under § 507(a)(2), ["gap" period claims in an involuntary case under § 507(a)(3),] and priority tax claims under § 507(a)(8)).

2.02 Class 2. The claim of _____, to the extent allowed as a secured claim under § 506 of the Code.

[Add other classes of secured creditors, if any. Note: Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).]

2.03 Class 3. All unsecured claims allowed under § 502 of the Code.

[Add other classes of unsecured claims, if any.]

2.04 Class 4 . Equity interests in the Debtor. [If the Debtor is an individual -- "The interests of an individual Debtor in property of the estate."]

ARTICLE III
TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

3.01 Unclassified Claims. Under section §1123(a)(1), administrative expense claims, ["gap" period claims in an involuntary case allowed under § 502(f) of the Code,] and priority tax claims are not in classes.

3.02 Administrative Expense Claims. Each holder of an administrative expense claim allowed under § 503 of the Code [, and a "gap" claim in an involuntary case allowed under § 502(f) of the Code,] will be paid in full on the effective date of this Plan (as defined in Article VII), in cash, or upon such other terms as may be agreed upon by the holder of the claim and the Debtor.

3.03 Priority Tax Claims . Each holder of a priority tax claim will be paid [specify terms of treatment consistent with § 1129(a)(9)(C) of the Code].

3.04 United States Trustee Fees. All fees required to be paid by 28 U.S.C. §1930(a)(6) (U.S Trustee Fees) will accrue and be timely paid until the case is closed, dismissed, or converted to another chapter of the Code. Any U.S. Trustee Fees owed on or before the effective date of this Plan will be paid on the effective date.

ARTICLE IV
TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

4.01 Claims and interests shall be treated as follows under this Plan:

Class	Impairment	Treatment
Class 1 - Priority Claims	[State whether impaired or unimpaired.]	[Insert treatment of priority claims in this Class, including the form, amount and timing of distribution, if any. For example: "Class 1 is unimpaired by this Plan, and each holder of a Class 1 Priority Claim will be paid in full, in cash, upon the later of the effective date of this Plan as defined in Article VII, or the date on which such claim is allowed by a final non-appealable order. Except: _____."]
Class 2 – Secured Claim of [Insert name of secured creditor.]	[State whether impaired or unimpaired.]	[Insert treatment of secured claim in this Class, including the form, amount and timing of distribution, if any.] [Add class[es] of secured claims if applicable]
Class 3 - General Unsecured Creditors	[State whether impaired or unimpaired.]	[Insert treatment of unsecured creditors in this Class, including the form, amount and timing of distribution, if any.] [Add administrative convenience class if applicable]
Class 4 - Equity Security Holders of the Debtor	[State whether impaired or unimpaired.]	[Insert treatment of equity security holders in this Class, including the form, amount and timing of distribution, if any.]

ARTICLE V
ALLOWANCE AND DISALLOWANCE OF CLAIMS

5.01 Disputed Claim. A disputed claim is a claim that has not been allowed or disallowed [by a final non-appealable order], and as to which either: (i) a proof of claim has been filed or deemed filed, and the Debtor or another party in interest has filed an objection; or (ii) no proof of claim has been filed, and the Debtor has scheduled such claim as disputed, contingent, or unliquidated.

5.02 Delay of Distribution on a Disputed Claim. No distribution will be made on account of a disputed claim unless such claim is allowed [by a final non-appealable order].

5.03 Settlement of Disputed Claims. The Debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019 of the Federal Rules of Bankruptcy Procedure.

ARTICLE VI
PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Assumed Executory Contracts and Unexpired Leases.

(a) The Debtor assumes the following executory contracts and/or unexpired leases effective upon the [Insert "effective date of this Plan as provided in Article VII," "the date of the entry of the order confirming this Plan," or other applicable date]:

[List assumed executory contracts and/or unexpired leases.]

(b) The Debtor will be conclusively deemed to have rejected all executory contracts and/or unexpired leases not expressly assumed under section 6.01(a) above, or before the date of the order confirming this Plan, upon the [Insert "effective date of this Plan," "the date of the entry of the order confirming this Plan," or other applicable date]. A proof of a claim arising from the rejection of an executory contract or unexpired lease under this section must be filed no later than _____ (___) days after the date of the order confirming this Plan.

ARTICLE VII
GENERAL PROVISIONS

7.01 Definitions and Rules of Construction. The definitions and rules of construction set forth in §§ 101 and 102 of the Code shall apply when terms defined or construed in the Code are used in this Plan, and they are supplemented by the following definitions: [Insert additional definitions if necessary].

7.02 Effective Date of Plan. The effective date of this Plan is the eleventh business day following the date of the entry of the order of confirmation. But if a stay of the confirmation order is in effect on that date, the effective date will be the first business day after that date on which no stay of the confirmation order is in effect, provided that the confirmation order has not been vacated.

7.03 Severability. If any provision in this Plan is determined to be unenforceable, the determination will in no way limit or affect the enforceability and operative effect of any other provision of this Plan.

7.04 Binding Effect. The rights and obligations of any entity named or referred to in this Plan will be binding upon, and will inure to the benefit of the successors or assigns of such entity.

7.05 Captions. The headings contained in this Plan are for convenience of reference only and do not affect the meaning or interpretation of this Plan.

[7.06 Controlling Effect. Unless a rule of law or procedure is supplied by federal law (including the Code or the Federal Rules of Bankruptcy Procedure), the laws of the State of _____ govern this Plan and any agreements, documents, and instruments executed in connection with this Plan, except as otherwise provided in this Plan.]

[7.07 Corporate Governance. [If the Debtor is a corporation include provisions required by § 1123(a)(6) of the Code.]]

ARTICLE VIII
DISCHARGE

[If the debtor is not entitled to discharge under 11 U.S.C. § 1141(d)(3) change this heading to "**NO DISCHARGE OF DEBTOR.**"]

8.01. **[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]**
Discharge. Confirmation of this Plan does not discharge any debt provided for in this Plan until the court grants a discharge on completion of all payments under this Plan, or as otherwise provided in § 1141(d)(5) of the Code. The Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and section 1141(d)(3) of the Code is not applicable]
Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. The Debtor will not be discharged from any debt imposed by this Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]
Discharge. On the confirmation date of this Plan, the debtor will be discharged from any debt that arose before confirmation of this Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor will not be discharged of any debt: (i) imposed by this Plan; (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure; or (iii) of a kind specified in § 1141(d)(6)(B).

[Option 4 – If § 1141(d)(3) is applicable]
No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

ARTICLE IX
OTHER PROVISIONS

[Insert other provisions, as applicable.]

Respectfully submitted,

By: _____
The Plan Proponent

By: _____
Attorney for the Plan Proponent

Instructions for Small Business Plan of Reorganization Form

BACKGROUND AND GENERAL INSTRUCTIONS

1. This small business chapter 11 plan of reorganization form is promulgated pursuant to § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It may be used in cases where the debtor (whether an individual or an artificial entity) is a small business debtor under § 101(51D) of the Code. This form is intended to be used in conjunction with the small business chapter 11 disclosure statement form (Official Form 25B). Because the type of debtor and the details of the proposed plan will vary from case to case, this form is intended to provide an illustrative format, rather than a specific prescription for the language or content of a plan in any particular case.
2. Some language in this form appears in brackets. The bracketed language sometimes instructs the plan's proponent to provide certain information and sometimes provides optional or alternative language that should be used when and where appropriate. Proponents should make the necessary insertions and/or delete inapplicable language.

SPECIFIC INSTRUCTIONS

SUMMARY

3. The first article should provide a summary of the debtor's proposed plan. It should describe the manner in which the plan will be consummated and the source of funds for payments to be made under the plan. These sources might include an infusion of capital, loan proceeds, sale of assets, cash flow from operations, or future income. The summary should also describe the treatment of the various classes of claimants under the plan.

CLASSIFICATION OF CLAIMS AND INTERESTS

4. The second article describes each class of claimants that will receive a distribution under the plan. The first class consists of claimants entitled to priority pursuant to § 507 of the Code other than those entitled to priority under § 507(a)(2), (3), or (8). The next class or group of classes consists of creditor(s) with allowed secured claims. Secured creditors are usually classified individually, with each secured creditor being placed in its own separate class. Classes of secured creditors should be added as necessary. Next, unsecured claimants, not entitled to priority, should be classified. The proponent may, to the extent allowed by law, create additional classes of

unsecured claims, including an administrative convenience class pursuant to § 1122(b) of the Code. The last class comprises the holders of equity interests in the debtor.

TREATMENT OF ADMINISTRATIVE EXPENSE CLAIMS, U.S. TRUSTEES FEES, AND PRIORITY TAX CLAIMS

5. The treatment of certain claims, such as administrative expense claims, allowed under § 503 of the Code, and priority tax claims, allowed under §507(a)(8) of the Code, is statutorily specified. These claims are not, therefore, placed into classes. Their treatment is described in the third Article.

TREATMENT OF CLAIMS AND INTERESTS UNDER THE PLAN

6. The fourth article specifies the treatment accorded the various classes of claims and interests provided for under the plan.
7. Priority claimants other than those allowed under §§ 503 and 507(a)(8) must be classified and paid in full under the plan unless the claimant agrees otherwise.
8. Each secured creditor is generally placed in its own class, with a particular treatment specified for that class. Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8).
9. The plan should describe the treatment of the general unsecured claims. An administrative convenience class may be created pursuant to § 1122(b) of the Code, and other classes of unsecured claims may be created to the extent permitted by applicable law.
10. Finally, the plan should describe the treatment of equity interests.

ALLOWANCE AND DISALLOWANCE OF CLAIMS

11. The fifth article addresses the treatment of disputed claims. A "disputed claim" is a claim that has not been allowed or disallowed. No distribution will be made on account of a disputed claim unless such claim is allowed. The debtor will have the power and authority to settle and compromise a disputed claim with court approval and compliance with Rule 9019.

PROVISIONS FOR EXECUTORY CONTRACTS AND UNEXPIRED LEASES

12. The sixth article deals with executory contracts and unexpired leases. The plan proponent should list all executory contracts and unexpired leases that it has already assumed, or which it intends to assume under the plan. All other executory contracts will be deemed rejected.

GENERAL PROVISIONS

13. The seventh article provides certain general provisions. Definitions from the Code are incorporated by reference, and any other definitions required by the plan should be listed in section 7.01 of the plan. If a governing law clause is desired, it should be included here, and if the debtor is a corporation, provisions required by §1123(a)(6) of the Code should be included.

DISCHARGE

14. The eighth article describes the effect of discharge under the plan. When and whether the debtor is entitled to a discharge will depend, among other things, upon whether the debtor is an individual, partnership, or corporation, and whether the debtor is continuing in business after consummation of the plan. The proponent should choose the appropriate language from the options provided.

OTHER PROVISIONS

15. To the extent that other provisions, not provided in the plan, are desired, they should be placed in the ninth article.

COMMITTEE NOTE

This form is new. It implements § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005). This form for a small business chapter 11 plan of reorganization may be used in cases where the debtor (whether an individual or an artificial entity) is a small business debtor under § 101(51D) of the Code. The form is intended to be used in conjunction with the small business chapter 11 disclosure statement form (Official Form 25B).

Because the type of debtor and the details of the proposed plan of reorganization may vary, the form is intended to provide an illustrative format, rather than a specific prescription for the language or content of a plan in any particular case. The form includes instructions and examples of the types of information needed to complete it.

Form 25B
(12/08)

United States Bankruptcy Court

_____ District of _____

In re_____, Case No. _____
Debtor

Small Business Case under Chapter 11

[NAME OF PLAN PROPONENT]'S DISCLOSURE STATEMENT, DATED [INSERT DATE]

Table of Contents

[Insert when text is finalized]

I. INTRODUCTION

This is the disclosure statement (the "Disclosure Statement") in the small business chapter 11 case of _____ (the "Debtor"). This Disclosure Statement contains information about the Debtor and describes the [insert name of plan] (the "Plan") filed by [the Debtor] on [insert date]. A full copy of the Plan is attached to this Disclosure Statement as Exhibit A. ***Your rights may be affected. You should read the Plan and this Disclosure Statement carefully and discuss them with your attorney. If you do not have an attorney, you may wish to consult one.***

The proposed distributions under the Plan are discussed at pages __-__ of this Disclosure Statement. [General unsecured creditors are classified in Class __, and will receive a distribution of ___ % of their allowed claims, to be distributed as follows _____.]

A. Purpose of This Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims or equity interests of the type you hold (*i.e.*, what you will receive on your claim or equity interest if the plan is confirmed),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the "Court") will consider when deciding whether to confirm the Plan,
- Why [the Proponent] believes the Plan is feasible, and how the treatment of your claim or equity interest under the Plan compares to what you would receive on your claim or equity interest in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. This section describes the procedures pursuant to which the Plan will or will not be confirmed.

1. *Time and Place of the Hearing to [Finally Approve This Disclosure Statement and] Confirm the Plan*

The hearing at which the Court will determine whether to [finally approve this Disclosure Statement and] confirm the Plan will take place on [insert date], at [insert time], in Courtroom ____, at the [Insert Courthouse Name, and Full Court Address, City, State, Zip Code].

2. *Deadline For Voting to Accept or Reject the Plan*

If you are entitled to vote to accept or reject the plan, vote on the enclosed ballot and return the ballot in the enclosed envelope to [insert address]. See section IV.A. below for a discussion of voting eligibility requirements.

Your ballot must be received by [insert date] or it will not be counted.

3. *Deadline For Objecting to the [Adequacy of Disclosure and] Confirmation of the Plan*

Objections to [this Disclosure Statement or to] the confirmation of the Plan must be filed with the Court and served upon [insert entities] by [insert date].

4. *Identity of Person to Contact for More Information*

If you want additional information about the Plan, you should contact [insert name and address of representative of plan proponent].

C. Disclaimer

The Court has [conditionally] approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted. [The Court's approval of this Disclosure Statement is subject to final approval at the hearing on confirmation of the Plan. Objections to the adequacy of this Disclosure Statement may be filed until _____.]

II. BACKGROUND

A. Description and History of the Debtor's Business

The Debtor is a [corporation, partnership, etc.]. Since [insert year operations commenced], the Debtor has been in the business of _____. [Describe the Debtor's business].

B. Insiders of the Debtor

[Insert a detailed list of the names of Debtor's insiders as defined in §101(31) of the United States Bankruptcy Code (the "Code") and their relationship to the Debtor. For each

insider, list all compensation paid by the Debtor or its affiliates to that person or entity during the two years prior to the commencement of the Debtor's bankruptcy case, as well as compensation paid during the pendency of this chapter 11 case.]

C. Management of the Debtor Before and During the Bankruptcy

During the two years prior to the date on which the bankruptcy petition was filed, the officers, directors, managers or other persons in control of the Debtor (collectively the "Managers") were [List the Managers of the Debtor prior to the petition date].

The Managers of the Debtor during the Debtor's chapter 11 case have been: [List Managers of the Debtor during the Debtor's chapter 11 case.]

After the effective date of the order confirming the Plan, the directors, officers, and voting trustees of the Debtor, any affiliate of the Debtor participating in a joint Plan with the Debtor, or successor of the Debtor under the Plan (collectively the "Post Confirmation Managers"), will be: [List Post Confirmation Managers of the Debtor.] The responsibilities and compensation of these Post Confirmation Managers are described in section __ of this Disclosure Statement.

D. Events Leading to Chapter 11 Filing

[Describe the events that led to the commencement of the Debtor's bankruptcy case.]

E. Significant Events During the Bankruptcy Case

[Describe significant events during the Debtor's bankruptcy case:

- Describe any asset sales outside the ordinary course of business, debtor in possession financing, or cash collateral orders.
- Identify the professionals approved by the court.
- Describe any adversary proceedings that have been filed or other significant litigation that has occurred (including contested claim disallowance proceedings), and any other significant legal or administrative proceedings that are pending or have been pending during the case in a forum other than the Court.
- Describe any steps taken to improve operations and profitability of the Debtor.
- Describe other events as appropriate.]

F. Projected Recovery of Avoidable Transfers [Choose the option that applies]

[Option 1 – If the Debtor does not intend to pursue avoidance actions]

The Debtor does not intend to pursue preference, fraudulent conveyance, or other avoidance actions.

[Option 2 – If the Debtor intends to pursue avoidance actions]

The Debtor estimates that up to $_____ may be realized from the recovery of fraudulent, preferential or other avoidable transfers. While the results of litigation cannot be predicted with certainty and it is possible that other causes of action may be identified, the following is a summary of the preference, fraudulent conveyance and other avoidance actions filed or expected to be filed in this case:

Transaction	Defendant	Amount Claimed

[Option 3 – If the Debtor does not yet know whether it intends to pursue avoidance actions]

The Debtor has not yet completed its investigation with regard to prepetition transactions. If you received a payment or other transfer within 90 days of the bankruptcy, or other transfer avoidable under the Code, the Debtor may seek to avoid such transfer.

G. **Claims Objections**

Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. The procedures for resolving disputed claims are set forth in Article V of the Plan.

H. **Current and Historical Financial Conditions**

The identity and fair market value of the estate's assets are listed in Exhibit B. [Identify source and basis of valuation.]

The Debtor's most recent financial statements [if any] issued before bankruptcy, each of which was filed with the Court, are set forth in Exhibit C.

[The most recent post-petition operating report filed since the commencement of the Debtor's bankruptcy case are set forth in Exhibit D.] [A summary of the Debtor's periodic operating reports filed since the commencement of the Debtor's bankruptcy case is set forth in Exhibit D.]

III. SUMMARY OF THE PLAN OF REORGANIZATION AND TREATMENT OF CLAIMS AND EQUITY INTERESTS

A. What is the Purpose of the Plan of Reorganization?

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. As such, the Plan Proponent has *not* placed the following claims in any class:

1. *Administrative Expenses*

Administrative expenses are costs or expenses of administering the Debtor's chapter 11 case which are allowed under § 507(a)(2) of the Code. Administrative expenses also include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment.

The following chart lists the Debtor's estimated administrative expenses, and their proposed treatment under the Plan:

Type	Estimated Amount Owed	Proposed Treatment
Expenses Arising in the Ordinary Course of Business After the Petition Date		Paid in full on the effective date of the Plan, or according to terms of obligation if later
The Value of Goods Received in the Ordinary Course of Business Within 20 Days Before the Petition Date		Paid in full on the effective date of the Plan, or according to terms of obligation if later

Professional Fees, as approved by the Court.		Paid in full on the effective date of the Plan, or according to separate written agreement, or according to court order if such fees have not been approved by the Court on the effective date of the Plan
Clerk's Office Fees		Paid in full on the effective date of the Plan
Other administrative expenses		Paid in full on the effective date of the Plan or according to separate written agreement
Office of the U.S. Trustee Fees		Paid in full on the effective date of the Plan
TOTAL		

2. *Priority Tax Claims*

Priority tax claims are unsecured income, employment, and other taxes described by § 507(a)(8) of the Code. Unless the holder of such a § 507(a)(8) priority tax claim agrees otherwise, it must receive the present value of such claim, in regular installments paid over a period not exceeding 5 years from the order of relief.

The following chart lists the Debtor's estimated § 507(a)(8) priority tax claims and their proposed treatment under the Plan:

Description (name and type of tax)	Estimated Amount Owed	Date of Assessment	Treatment
			Pmt interval = [Monthly] payment = Begin date = End date = Interest Rate % = Total Payout Amount = $
			Pmt interval = [Monthly] payment = Begin date = End date = Interest Rate % = Total Payout Amount = $

C. Classes of Claims and Equity Interests

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

1. *Classes of Secured Claims*

Allowed Secured Claims are claims secured by property of the Debtor's bankruptcy estate (or that are subject to setoff) to the extent allowed as secured claims under § 506 of the Code. If the value of the collateral or setoffs securing the creditor's claim is less than the amount of the creditor's allowed claim, the deficiency will [be classified as a general unsecured claim].

The following chart lists all classes containing Debtor's secured prepetition claims and their proposed treatment under the Plan:

Class #	Description	Insider? (Yes or No)	Impairment	Treatment
	Secured claim of: Name = Collateral description = Allowed Secured Amount = $_____ Priority of lien = Principal owed = $_____ Pre-pet. arrearage = $_____ Total claim = $_____		[State whether impaired or unimpaired]	[Monthly] Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % = Treatment of Lien = [Additional payment required to cure defaults] =

	Secured claim of: Name = Collateral description = Allowed Secured Amount = $_____ Priority of lien = Principal owed = $_____ Pre-pet. arrearage = $_____ Total claim = $_____		[State whether impaired or unimpaired]	Monthly Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % = Treatment of Lien = [Additional payment required to cure defaults] =

2. *Classes of Priority Unsecured Claims*

Certain priority claims that are referred to in §§ 507(a)(1), (4), (5), (6), and (7) of the Code are required to be placed in classes. The Code requires that each holder of such a claim receive cash on the effective date of the Plan equal to the allowed amount of such claim. However, a class of holders of such claims may vote to accept different treatment.

The following chart lists all classes containing claims under §§ 507(a)(1), (4), (5), (6), and (a)(7) of the Code and their proposed treatment under the Plan:

Class #	Description	Impairment	Treatment
	Priority unsecured claim pursuant to Section [insert] Total amt of claims = $	[State whether impaired or unimpaired]	
	Priority unsecured claim pursuant to Section [insert] Total amt of claims = $	[State whether impaired or unimpaired]	

3. *Class[es] of General Unsecured Claims*

General unsecured claims are not secured by property of the estate and are not entitled to priority under § 507(a) of the Code. [Insert description of §1122(b) convenience class if applicable.]

The following chart identifies the Plan's proposed treatment of Class[es] __ through __, which contain general unsecured claims against the Debtor:

Class #	Description	Impairment	Treatment
	[1122(b) Convenience Class]	[State whether impaired or unimpaired]	[Insert proposed treatment, such as "Paid in full in cash on effective date of the Plan or when due under contract or applicable nonbankruptcy law"]
	General Unsecured Class	[State whether impaired or unimpaired]	Monthly Pmt = Pmts Begin = Pmts End = [Balloon pmt] = Interest rate % from [date] = Estimated percent of claim paid =

4. *Class[es] of Equity Interest Holders*

Equity interest holders are parties who hold an ownership interest (*i.e.*, equity interest) in the Debtor. In a corporation, entities holding preferred or common stock are equity interest holders. In a partnership, equity interest holders include both general and limited partners. In a limited liability company ("LLC"), the equity interest holders are the members. Finally, with respect to an individual who is a debtor, the Debtor is the equity interest holder.

The following chart sets forth the Plan's proposed treatment of the class[es] of equity interest holders: [There may be more than one class of equity interests in, for example, a partnership case, or a case where the prepetition debtor had issued multiple classes of stock.]

Class #	Description	Impairment	Treatment
	Equity interest holders	[State whether impaired or unimpaired]	

D. **Means of Implementing the Plan**

1. *Source of Payments*

Payments and distributions under the Plan will be funded by the following:

[Describe the source of funds for payments under the Plan.]

2. *Post-confirmation Management*

The Post-Confirmation Managers of the Debtor, and their compensation, shall be as follows:

Name	Affiliations	Insider (yes or no)?	Position	Compensation

E. **Risk Factors**

The proposed Plan has the following risks:

[List all risk factors that might affect the Debtor's ability to make payments and other distributions required under the Plan.]

F. **Executory Contracts and Unexpired Leases**

The Plan, in Exhibit 5.1, lists all executory contracts and unexpired leases that the Debtor will assume under the Plan. Assumption means that the Debtor has elected to continue to perform the obligations under such contracts and unexpired leases, and to cure defaults of the type that must be cured under the Code, if any. Exhibit 5.1 also lists how the Debtor will cure and compensate the other party to such contract or lease for any such defaults.

If you object to the assumption of your unexpired lease or executory contract, the proposed cure of any defaults, or the adequacy of assurance of performance, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan, unless the Court has set an earlier time.

All executory contracts and unexpired leases that are not listed in Exhibit 5.1 will be rejected under the Plan. Consult your adviser or attorney for more specific information about particular contracts or leases.

If you object to the rejection of your contract or lease, you must file and serve your objection to the Plan within the deadline for objecting to the confirmation of the Plan.

[***The Deadline for Filing a Proof of Claim Based on a Claim Arising from the Rejection of a Lease or Contract Is _____.*** Any claim based on the rejection of a contract or lease will be barred if the proof of claim is not timely filed, unless the Court orders otherwise.]

G. Tax Consequences of Plan

Creditors and Equity Interest Holders Concerned with How the Plan May Affect Their Tax Liability Should Consult with Their Own Accountants, Attorneys, And/Or Advisors.

The following are the anticipated tax consequences of the Plan: [List the following general consequences as a minimum: (1)Tax consequences to the Debtor of the Plan; (2) General tax consequences on creditors of any discharge, and the general tax consequences of receipt of plan consideration after confirmation.]

IV. CONFIRMATION REQUIREMENTS AND PROCEDURES

To be confirmable, the Plan must meet the requirements listed in §§ 1129(a) or (b) of the Code. These include the requirements that: the Plan must be proposed in good faith; at least one impaired class of claims must accept the plan, without counting votes of insiders; the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and the Plan must be feasible. These requirements are <u>not</u> the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor or equity interest holder has a right to vote for or against the Plan only if that creditor or equity interest holder has a claim or equity interest that is both (1) allowed or allowed for voting purposes and (2) impaired.

In this case, the Plan Proponent believes that classes _____ are impaired and that holders of claims in each of these classes are therefore entitled to vote to accept or reject the Plan. The Plan Proponent believes that classes _____ are unimpaired and that holders of claims in each of these classes, therefore, do not have the right to vote to accept or reject the Plan.

1. *What Is an Allowed Claim or an Allowed Equity Interest?*

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either (1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or (2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest. When a claim or equity interest is not allowed, the creditor or equity interest holder holding the claim or equity interest cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim or equity interest for voting purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

The deadline for filing a proof of claim in this case was _____.
[If applicable – The deadline for filing objections to claims is_____.]

2. *What Is an Impaired Claim or Impaired Equity Interest?*

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered impaired if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. *Who is **Not** Entitled to Vote*

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court;
- holders of other claims or equity interests that are not "allowed claims" or "allowed equity interests" (as discussed above), unless they have been "allowed" for voting purposes.

- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code; and
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan;
- administrative expenses.

Even If You Are Not Entitled to Vote on the Plan, You Have a Right to Object to the Confirmation of the Plan [and to the Adequacy of the Disclosure Statement].

4. *Who Can Vote in More Than One Class*

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

B. **Votes Necessary to Confirm the Plan**

If impaired classes exist, the Court cannot confirm the Plan unless (1) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and (2) all impaired classes have voted to accept the Plan, unless the Plan is eligible to be confirmed by "cram down" on non-accepting classes, as discussed later in Section [B.2.].

1. *Votes Necessary for a Class to Accept the Plan*

A class of claims accepts the Plan if both of the following occur: (1) the holders of more than one-half (1/2) of the allowed claims in the class, who vote, cast their votes to accept the Plan, and (2) the holders of at least two-thirds (2/3) in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

A class of equity interests accepts the Plan if the holders of at least two-thirds (2/3) in amount of the allowed equity interests in the class, who vote, cast their votes to accept the Plan.

2. *Treatment of Nonaccepting Classes*

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan if the nonaccepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds nonaccepting classes is commonly referred to as a "cram down" plan. The Code allows the Plan to bind nonaccepting classes of claims or equity interests if it meets all

the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not "discriminate unfairly," and is "fair and equitable" toward each impaired class that has not voted to accept the Plan.

You should consult your own attorney if a "cramdown" confirmation will affect your claim or equity interest, as the variations on this general rule are numerous and complex.

C. Liquidation Analysis

To confirm the Plan, the Court must find that all creditors and equity interest holders who do not accept the Plan will receive at least as much under the Plan as such claim and equity interest holders would receive in a chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement as Exhibit E.

D. Feasibility

The Court must find that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtor or any successor to the Debtor, unless such liquidation or reorganization is proposed in the Plan.

1. *Ability to Initially Fund Plan*

The Plan Proponent believes that the Debtor will have enough cash on hand on the effective date of the Plan to pay all the claims and expenses that are entitled to be paid on that date. Tables showing the amount of cash on hand on the effective date of the Plan, and the sources of that cash are attached to this disclosure statement as Exhibit F.

2. *Ability to Make Future Plan Payments And Operate Without Further Reorganization*

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments.

The Plan Proponent has provided projected financial information. Those projections are listed in Exhibit G.

The Plan Proponent's financial projections show that the Debtor will have an aggregate annual average cash flow, after paying operating expenses and post-confirmation taxes, of $____. The final Plan payment is expected to be paid on _____.

[Summarize the numerical projections, and highlight any assumptions that are not in accord with past experience. Explain why such assumptions should now be made.]

You Should Consult with Your Accountant or other Financial Advisor If You Have Any Questions Pertaining to These Projections.

V. EFFECT OF CONFIRMATION OF PLAN

A. DISCHARGE OF DEBTOR [If the Debtor is not entitled to discharge pursuant to 11 U.S.C. § 1141(d)(3) change this heading to "**NO DISCHARGE OF DEBTOR.**"]

[Option 1 – If Debtor is an individual and § 1141(d)(3) is not applicable]

Discharge. Confirmation of the Plan does not discharge any debt provided for in the Plan until the court grants a discharge on completion of all payments under the Plan, or as otherwise provided in § 1141(d)(5) of the Code. Debtor will not be discharged from any debt excepted from discharge under § 523 of the Code, except as provided in Rule 4007(c) of the Federal Rules of Bankruptcy Procedure.

[Option 2 -- If the Debtor is a partnership and § 1141(d)(3) of the Code is not applicable]

Discharge. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code. However, the Debtor shall not be discharged from any debt imposed by the Plan. After the effective date of the Plan your claims against the Debtor will be limited to the debts imposed by the Plan.

[Option 3 -- If the Debtor is a corporation and § 1141(d)(3) is not applicable]

Discharge. On the effective date of the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in § 1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt (i) imposed by the Plan, (ii) of a kind specified in § 1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of the Federal Rules of Bankruptcy Procedure, or (iii) of a kind specified in § 1141(d)(6)(B). After the effective date of the Plan your claims against the Debtor will be limited to the debts described in clauses (i) through (iii) of the preceding sentence.

[Option 4 – If § 1141(d)(3) is applicable]

No Discharge. In accordance with § 1141(d)(3) of the Code, the Debtor will not receive any discharge of debt in this bankruptcy case.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation of the Plan. However, the Court may require a new disclosure statement and/or revoting on the Plan.

[If the Debtor is not an individual, add the following: "The Plan Proponent may also seek to modify the Plan at any time after confirmation only if (1) the Plan has not been substantially consummated *and* (2) the Court authorizes the proposed modifications after notice and a hearing."]

[If the Debtor is an individual, add the following: "Upon request of the Debtor, the United States trustee, or the holder of an allowed unsecured claim, the Plan may be modified at any time after confirmation of the Plan but before the completion of payments under the Plan, to (1) increase or reduce the amount of payments under the Plan on claims of a particular class, (2) extend or reduce the time period for such payments, or (3) alter the amount of distribution to a creditor whose claim is provided for by the Plan to the extent necessary to take account of any payment of the claim made other than under the Plan."]

C. Final Decree

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan Proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VI. OTHER PLAN PROVISIONS

[Insert other provisions here, as necessary and appropriate.]

_____

[Signature of the Plan Proponent]

_____

[Signature of the Attorney for the Plan Proponent]

EXHIBITS

Exhibit A – Copy of Proposed Plan of Reorganization

Exhibit B – Identity and Value of Material Assets of Debtor

Exhibit C – Prepetition Financial Statements
(to be taken from those filed with the court)

Exhibit D – [Most Recently Filed Postpetition Operating Report][Summary of Postpetition Operating Reports]

Exhibit E – Liquidation Analysis

Plan Proponent's Estimated Liquidation Value of Assets

Assets	
a. Cash on hand	$
b. Accounts receivable	$
c. Inventory	$
d. Office furniture & equipment	$
e. Machinery & equipment	$
f. Automobiles	$
g. Building & Land	$
h. Customer list	$
i. Investment property (such as stocks, bonds or other financial assets)	$
j. Lawsuits or other claims against third-parties.	$
k. Other intangibles (such as avoiding powers actions)	$
Total Assets at Liquidation Value	**$**
Less:	
Secured creditors' recoveries	**$**
Less:	
Chapter 7 trustee fees and expenses	$
Less:	
Chapter 11 administrative expenses	$
Less:	
Priority claims, excluding administrative expense claims	$
[Less:	
Debtor's claimed exemptions]	$
(1) Balance for unsecured claims	$
(2) Total dollar amount of unsecured claims	$
Percentage of Claims Which Unsecured Creditors Would Receive Or Retain in a Chapter 7 Liquidation:	$
Percentage of Claims Which Unsecured Creditors Will Receive or Retain under the Plan:	____% [Divide (1) by (2)]
	____%

Exhibit F – Cash on hand on the effective date of the Plan

Cash on hand on effective date of the Plan:	$
Less –	
Amount of administrative expenses payable on effective date of the Plan	-
Amount of statutory costs and charges	-
Amount of cure payments for executory contracts:	-
Other Plan Payments due on effective date of the Plan	-
Balance after paying these amounts.....	$

The sources of the cash Debtor will have on hand by the effective date of the Plan are estimated as follows:

$	Cash in Debtor's bank account now
+	Additional cash Debtor will accumulate from net earnings between now and effective date of the Plan [state the basis for such projections]
+	Borrowing [separately state terms of repayment]
+	Capital Contributions
+	Other
$	Total [This number should match "cash on hand" figure noted above

Exhibit G – Projections of Cash Flow and Earnings for Post-Confirmation Period

Instructions for Form Disclosure Statement

BACKGROUND AND GENERAL INSTRUCTIONS

1. This small business chapter 11 disclosure statement form is promulgated pursuant to § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This form may be used in cases where the debtor (whether an individual or an artificial entity) is a small business debtor within the meaning of § 101(51D) of the Code. This form provides a format for disseminating to parties in interest information about the plan of reorganization in a debtor's small business chapter 11 case, so that those parties can make reasonably informed judgments whether to accept, reject or object to the plan. Because the relevant legal requirements for and effects of a plan's confirmation may vary depending on the nature of the debtor, and because the details of any proposed reorganization necessarily vary, this form is intended to provide a format for disclosure, rather than a specific prescription for the language or content of a disclosure statement in any particular case. The form highlights the factual and legal disclosures required by § 1125 of the Code in connection with the plan's confirmation. It is not intended to restrict the plan's proponent from providing additional information where that would be useful.

2. Proponents are encouraged to present material information in as clear a fashion as possible, including, where feasible, in an accompanying executive summary, approved by the court, that highlights particular creditors' or interest holders' voting status and treatment under the plan.

3. Some language in this form appears in brackets. The bracketed language sometimes instructs the plan's proponent to provide certain information, and sometimes provides optional or alternative language that should be used when and where appropriate. Proponents should make the necessary insertions and/or delete inapplicable language.

SPECIFIC INSTRUCTIONS

INTRODUCTORY SECTION

4. The introductory section describes the purpose of the disclosure statement, provides procedural information regarding confirmation of the plan, including where to obtain additional information, indicates whether particular claimants or interest holders will be entitled to vote on the plan, and details the procedures and deadlines for filing objections to confirmation of the plan. A

copy of the plan should be attached to the debtor's disclosure statement as Exhibit A. Where the proposed distribution to unsecured creditors and other classes can be succinctly summarized, describe that distribution in the second introductory paragraph.

5. In some cases, the court will approve the debtor's disclosure statement prior to solicitation of acceptance or rejection of the plan. See Rule 3017. In other cases, the court may conditionally approve the disclosure statement, and combine the hearing on the adequacy of disclosure and the hearing on confirmation of the plan into one hearing. See Rule 3017.1. Use the bracketed language as appropriate in subsections I.B. and I.C.

BACKGROUND SECTION

6. The second part of disclosure statement provides a history of the debtor's business, both before and during the debtor's bankruptcy case. In this section, the plan proponent should describe the debtor's business, the events that led to the filing of the debtor's bankruptcy petition, and the key events in the debtor's bankruptcy case, and identify the people who managed the debtor during the case and who will manage the debtor after the plan is confirmed. The proponent should disclose its intentions with regard to, and the status of, avoidance actions. If the debtor or proponent intends to bring an avoidance action against a particular creditor or equity interest holder, the disclosure statement should disclose this fact so that the creditor or equity interest holder can use that information to determine the value of its claim or interest when considering whether to accept or reject the plan. If the debtor or plan proponent is uncertain as to what avoidance actions might be brought, that fact should be disclosed as well, so that claimants and equity interest holders can take that information into account, as well, when considering whether to accept or reject the plan.

7. A schedule of the debtor's material assets, along with the basis for their valuation should be attached to the debtor's disclosure statement as Exhibit B. Under § 1116 of the Code, the debtor must also file its most recent prepetition financial statements with the petition. These financial statements should be attached to the debtor's disclosure statement as Exhibit C.

8. Sections 434 and 435 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and § 308 of the Code require the debtor to file periodic operating reports with the court. The most recent such reports, or a summary of the filed reports, should be attached to the debtor's disclosure statement as Exhibit D.

SUMMARY OF PLAN

9. The third part of the disclosure statement describes the treatment of various creditors and equity interest holders who will receive distributions under the plan. Because the treatment of certain claims, such as administrative expense claims, allowed under § 503 of the Code, and priority tax claims, allowed under §507(a)(8) of the Code, is statutorily specified, these claims are not placed into classes. Secured creditors are generally each placed in their own class, with the particular treatment specified for that class. Section 1129(a)(9)(D) of the Code provides that a secured tax claim which would otherwise meet the description of a priority tax claim under § 507(a)(8) of the Code is to be paid in the same manner and over the same period as prescribed in § 507(a)(8) of the Code. While it is not required, the proponent may, where applicable, wish to classify claims under § 507(a)(9) and (10) of the Code. Finally, the disclosure statement should describe the treatment of the general unsecured claimants and equity interest holders. An administrative convenience class may be created pursuant to § 1122(b) of the Code, and other classes of unsecured claims may be created to the extent permitted by applicable case law. Also, while the suggested language of the form contemplates that plan distributions will be in the form of monthly payments, other forms of consideration are permitted and this section of the disclosure statement should be modified to describe clearly the form(s), methods and timing of payments to be made under the particular plan.

10. The disclosure statement should also detail the sources of funds for payments to be made under the plan. These should include the sources of funds for payments to be made on the effective date of the plan (detailed in Exhibit F), and the source of payments that will be made over the life of the plan. The description should be supported by projections about the income and profitability of the debtor. The plan proponent must also fully describe post-confirmation management, as required by § 1129(a)(5) of the Code. The disclosure statement should also describe any risk factors that might influence the debtor's ability to complete the payments or affect the value of the distributions provided for under the plan. Also, the disclosure statement should list any material executory contracts that will be assumed pursuant to the plan, as well as any material contracts that will be rejected. To the extent possible, the tax consequences of the plan should also be summarized.

CONFIRMATION REQUIREMENTS AND PROCEDURES SECTION

11. The fourth part of the disclosure statement sets forth the procedures and requirements for confirmation. In this regard, the disclosure statement should inform creditors and equity interest holders of (1) which class they are in, (2) whether they are entitled to vote, and (3) the amount of their claim allowed for voting purposes. This may be accomplished in the disclosure statement itself or, as noted above, in a summary statement, approved by the court, and sent to

the parties in interest along with the disclosure statement. A liquidation analysis of the debtor should be attached to the disclosure statement as Exhibit E. As noted above, the sources of funds for payments to be made on the effective date of the plan should be detailed in Exhibit F, and projections about the profitability and cash flow of the debtor's business after confirmation should be attached to the disclosure statement as Exhibit G.

EFFECT OF PLAN CONFIRMATION

12. The fifth part of the disclosure statement describes the effect of plan confirmation. The language used here should be chosen with care, as the effect of confirmation differs depending on whether the debtor is an individual, partnership, or corporation, and on whether the debtor will continue in business post-confirmation or will, instead, be liquidated.

13. If the plan provides that, after its confirmation, property of the estate will vest in and be distributed by someone other than the debtor, the disclosure statement should identify any such property and the person in whom the property will vest.

OTHER PROVISIONS

14. Other provisions may be added in Part VI as desired and appropriate.

COMMITTEE NOTE

This form is new. It implements § 433 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which provides for an official form for a disclosure statement that may be used in cases where the debtor (whether an individual or an artifical entity) is a small business debtor under § 101(51D) of the Code. The form provides a format for disseminating information to parties in interest about the plan of reorganization in a small business debtor's chapter 11 case, so that a party can make a reasonably informed judgment whether to accept, reject, or object to a proposed plan of reorganization or liquidation.

The form is intended to be used in conjunction with the form small business chapter 11 plan (Official Form 25A). As required by § 433 of the 2005 Act, the form seeks to strike a practical balance between the reasonable needs of the courts, the United States trustee, creditors, and other parties in interest for reasonably complete information, on the one hand, and economy and simplicity for debtors, on the other. The form includes instructions and examples of the types of information needed to complete it.

Because the relevant legal requirements for, and effect of, a plan's confirmation may vary depending on the nature of the debtor and the details of the proposed plan, this form is intended to provide an illustrative format for disclosure, rather than a specific prescription for the language or content of a particular disclosure statement. The form highlights the factual and legal disclosures required for adequate disclosure under § 1125 of the Code. The form is not intended to restrict a plan proponent from providing additional information where that would be useful. Plan proponents are encouraged to present material information in as clear a manner as possible, including, where feasible, by providing an accompanying executive summary, approved by the court, that highlights particular creditors' or interest holders' voting status and treatment under the plan.

Rule 3016 specifies the manner in which the disclosure statement is to be filed. Rule 3017 specifies the manner in which the court will consider it. Rule 3017.1 specifies special procedures for the court's conditional approval of a disclosure statement in a small business case.

Form 25C
(12/08)

United States Bankruptcy Court

_____ District of _____

In re_____, Debtor

Case No. _____

Small Business Case under Chapter 11

SMALL BUSINESS MONTHLY OPERATING REPORT

Month: _____ **Date Filed:** _____

Line of Business: _____ **NAICS Code:** _____

IN ACCORDANCE WITH TITLE 28, SECTION 1746, OF THE UNITED STATES CODE, I DECLARE UNDER PENALTY OF PERJURY THAT I HAVE EXAMINED THE FOLLOWING SMALL BUSINESS MONTHLY OPERATING REPORT AND THE ACCOMPANYING ATTACHMENTS AND, TO THE BEST OF MY KNOWLEDGE, THESE DOCUMENTS ARE TRUE, CORRECT AND COMPLETE.

RESPONSIBLE PARTY:

_____
ORIGINAL SIGNATURE OF RESPONSIBLE PARTY

_____
PRINTED NAME OF RESPONSIBLE PARTY

QUESTIONNAIRE: (All questions to be answered on behalf of the debtor.)	**YES**	**NO**
1. IS THE BUSINESS STILL OPERATING?	☐	☐
2. HAVE YOU PAID ALL YOUR BILLS ON TIME THIS MONTH?	☐	☐
3. DID YOU PAY YOUR EMPLOYEES ON TIME?	☐	☐
4. HAVE YOU DEPOSITED ALL THE RECEIPTS FOR YOUR BUSINESS INTO THE DIP ACCOUNT THIS MONTH?	☐	☐
5. HAVE YOU FILED ALL OF YOUR TAX RETURNS AND PAID ALL OF YOUR TAXES THIS MONTH?	☐	☐
6. HAVE YOU TIMELY FILED ALL OTHER REQUIRED GOVERNMENT FILINGS?	☐	☐
7. HAVE YOU PAID ALL OF YOUR INSURANCE PREMIUMS THIS MONTH?	☐	☐
8. DO YOU PLAN TO CONTINUE TO OPERATE THE BUSINESS NEXT MONTH?	☐	☐
9. ARE YOU CURRENT ON YOUR QUARTERLY FEE PAYMENT TO THE U.S. TRUSTEE?	☐	☐
10. HAVE YOU PAID ANYTHING TO YOUR ATTORNEY OR OTHER PROFESSIONALS THIS MONTH?	☐	☐
11. DID YOU HAVE ANY UNUSUAL OR SIGNIFICANT UNANTICIPATED EXPENSES THIS MONTH?	☐	☐
12. HAS THE BUSINESS SOLD ANY GOODS OR PROVIDED SERVICES OR TRANSFERRED ANY ASSETS TO ANY BUSINESS RELATED TO THE DIP IN ANY WAY?	☐	☐

13. DO YOU HAVE ANY BANK ACCOUNTS OPEN OTHER THAN THE DIP ACCOUNT? ☐ ☐

14. HAVE YOU SOLD ANY ASSETS OTHER THAN INVENTORY THIS MONTH? ☐ ☐

15. DID ANY INSURANCE COMPANY CANCEL YOUR POLICY THIS MONTH? ☐ ☐

16. HAVE YOU BORROWED MONEY FROM ANYONE THIS MONTH? ☐ ☐

17. HAVE YOU PAID ANY BILLS YOU OWED BEFORE YOU FILED BANKRUPTCY? ☐ ☐

TAXES

DO YOU HAVE ANY PAST DUE TAX RETURNS OR PAST DUE POST-PETITION TAX OBLIGATIONS? ☐ ☐

IF YES, PLEASE PROVIDE A WRITTEN EXPLANATION INCLUDING WHEN SUCH RETURNS WILL BE FILED, OR WHEN SUCH PAYMENTS WILL BE MADE AND THE SOURCE OF THE FUNDS FOR THE PAYMENT.

(Exhibit A)

INCOME

PLEASE SEPARATELY LIST ALL OF THE INCOME YOU RECEIVED FOR THE MONTH. THE LIST SHOULD INCLUDE ALL INCOME FROM CASH AND CREDIT TRANSACTIONS. (THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)

TOTAL INCOME _____

(Exhibit B)

EXPENSES

PLEASE SEPARATELY LIST ALL EXPENSES PAID BY CASH OR BY CHECK FROM YOUR BANK ACCOUNTS THIS MONTH. INCLUDE THE DATE PAID, WHO WAS PAID THE MONEY, THE PURPOSE AND THE AMOUNT. (THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)

TOTAL EXPENSES _____

(Exhibit C)

CASH PROFIT

INCOME FOR THE MONTH (TOTAL FROM EXHIBIT B) _____

EXPENSES FOR THE MONTH (TOTAL FROM EXHIBIT C) _____

(Subtract Line C from Line B) **CASH PROFIT FOR THE MONTH** _____

UNPAID BILLS

PLEASE ATTACH A LIST OF ALL DEBTS (INCLUDING TAXES) WHICH YOU HAVE INCURRED SINCE THE DATE YOU FILED BANKRUPTCY BUT HAVE NOT PAID. THE LIST MUST INCLUDE THE DATE THE DEBT WAS INCURRED, WHO IS OWED THE MONEY, THE PURPOSE OF THE DEBT AND WHEN THE DEBT IS DUE. (THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)

TOTAL PAYABLES _____

(Exhibit D)

MONEY OWED TO YOU

PLEASE ATTACH A LIST OF ALL AMOUNTS OWED TO YOU BY YOUR CUSTOMERS FOR WORK YOU HAVE DONE OR THE MERCHANDISE YOU HAVE SOLD. YOU SHOULD INCLUDE WHO OWES YOU MONEY, HOW MUCH IS OWED AND WHEN IS PAYMENT DUE. (THE U.S. TRUSTEE MAY WAIVE THIS REQUIREMENT.)

TOTAL RECEIVABLES _____

(Exhibit E)

BANKING INFORMATION

PLEASE ATTACH A COPY OF YOUR LATEST BANK STATEMENT FOR EVERY ACCOUNT YOU HAVE AS OF THE DATE OF THIS FINANCIAL REPORT OR HAD DURING THE PERIOD COVERED BY THIS REPORT.

_____

_____

(Exhibit F)

EMPLOYEES

NUMBER OF EMPLOYEES WHEN THE CASE WAS FILED? _____

NUMBER OF EMPLOYEES AS OF THE DATE OF THIS MONTHLY REPORT? _____

PROFESSIONAL FEES

BANKRUPTCY RELATED:

PROFESSIONAL FEES RELATING TO THE BANKRUPTCY CASE PAID DURING THIS REPORTING PERIOD? _____

TOTAL PROFESSIONAL FEES RELATING TO THE BANKRUPTCY CASE PAID SINCE THE FILING OF THE CASE? _____

NON-BANKRUPTCY RELATED:

PROFESSIONAL FEES PAID NOT RELATING TO THE BANKRUPTCY CASE PAID DURING THIS REPORTING PERIOD? _____

TOTAL PROFESSIONAL FEES PAID NOT RELATING TO THE BANKRUPTCY CASE PAID DURING THIS REPORTING PERIOD? _____

PROJECTIONS

COMPARE YOUR ACTUAL INCOME AND EXPENSES TO THE PROJECTIONS FOR THE FIRST 180-DAYS OF YOUR CASE PROVIDED AT THE INITIAL DEBTOR INTERVIEW.

	Projected	Actual	Difference
INCOME			
EXPENSES			
CASH PROFIT			

TOTAL PROJECTED INCOME FOR THE NEXT MONTH:

TOTAL PROJECTED EXPENSES FOR THE NEXT MONTH:

TOTAL PROJECTED CASH PROFIT FOR THE NEXT MONTH:

ADDITIONAL INFORMATION

PLEASE ATTACH ALL FINANCIAL REPORTS INCLUDING AN INCOME STATEMENT AND BALANCE SHEET WHICH YOU PREPARE INTERNALLY.

COMMITTEE NOTE

This form is new. It implements § § 434 and 435 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which provided for rules and an official form to assist small business debtors in chapter 11 cases to fulfill their responsibilities under § 308 of the Code, a provision added by the 2005 Act. The form directs the debtor to disclose the information required under § 308 and resembles those developed earlier by the United States trustees for use in supervising debtors in possession in chapter 11 cases.

Form 26
(12/08)

United States Bankruptcy Court

_____ District of _____

In re_____, Case No. _____

Debtor Chapter 11

PERIODIC REPORT REGARDING VALUE, OPERATIONS AND PROFITABILITY OF ENTITIES IN WHICH THE ESTATE OF [NAME OF DEBTOR] HOLDS A SUBSTANTIAL OR CONTROLLING INTEREST

This is the report as of _____on the value, operations and profitability of those entities in which the estate holds a substantial or controlling interest, as required by Bankruptcy Rule 2015.3. The estate of [Name of Debtor] holds a substantial or controlling interest in the following entities:

Name of Entity	Interest of the Estate	Tab #

This periodic report (the "Periodic Report") contains separate reports ("Entity Reports") on the value, operations, and profitability of each entity listed above.

Each Entity Report shall consist of three exhibits. Exhibit A contains a valuation estimate for the entity as of a date not more than two years prior to the date of this report. It also contains a description of the valuation method used. Exhibit B contains a balance sheet, a statement of income (loss), a statement of cash flows, and a statement of changes in shareholders' or partners' equity (deficit) for the period covered by the Entity Report, along with summarized footnotes. Exhibit C contains a description of the entity's business operations.

THIS REPORT MUST BE SIGNED BY A REPRESENTATIVE OF THE TRUSTEE OR DEBTOR IN POSSESSION.

The undersigned, having reviewed the above listing of entities in which the estate of [Debtor] holds a substantial or controlling interest, and being familiar with the Debtor's financial affairs, verifies under the penalty of perjury that the listing is complete, accurate and truthful to the best of his/her knowledge.

Date: _____

_____
Signature of Authorized Individual

_____
Name of Authorized Individual

_____
Title of Authorized Individual

[If the Debtor is an individual or in a joint case]

Signature(s) of Debtor(s) (Individual/Joint)

_____
Signature of Debtor

_____
Signature of Joint Debtor

Exhibit A
Valuation Estimate for [Name of Entity]

[Provide a statement of the entity's value and the value of the estate's interest in the entity, including a description of the basis for the valuation, the date of the valuation and the valuation method used. This valuation must be no more than two years old. Indicate the source of this information.]

Exhibit B

Financial Statements for [Insert Name of Entity]

Exhibit B-1
Balance Sheet for [Name of Entity]
As of [date]

[Provide a balance sheet dated as of the end of the most recent six-month period of the current fiscal year and as of the end of the preceding fiscal year. Indicate the source of this information.]

Exhibit B-2

Statement of Income (Loss) for [Name of Entity]

Period ending [date]

[Provide a statement of income (loss) for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Indicate the source of this information.]

Exhibit B-3

Statement of Cash Flows for [Name of Entity]

For the period ending [date]

[Provide a statement of changes in cash flows for the following periods:

(i) For the initial report:

a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and

b. the prior fiscal year.

(ii) For subsequent reports, since the closing date of the last report.

Indicate the source of this information.]

Exhibit B-4
Statement of Changes in Shareholders'/Partners' Equity (Deficit) for [Name of Entity]
period ending [date]

[Provide a statement of changes in shareholders'/partners equity (deficit) for the following periods:

(i) For the initial report:
  a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and
  b. the prior fiscal year.
(ii) For subsequent reports, since the closing date of the last report.

Indicate the source of this information.]

Exhibit C
Description of Operations for [name of entity]

[Describe the nature and extent of the estate's interest in the entity.

Describe the business conducted and intended to be conducted by the entity, focusing on the entity's dominant business segment(s). Indicate the source of this information.]

Form 26, Instructions
(12/08)

Instructions for Periodic Report Concerning Related Entities

General Instructions

1. This form periodic report ("Periodic Report") on value, profitability, and operations of entities in which the estate holds a substantial or controlling interest (the "Form") implements § 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 19-8, 119 Stat. 23 (April 20, 2005)("BAPCPA"). This Form should be used when required by Fed. R. Bankr. P. 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule.

2. In a chapter 11 case, the trustee or debtor in possession shall file Periodic Reports of the value, operations, and profitability of each entity that is not also a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by this Form, and shall be based upon the most recent information reasonably available to the trustee or debtor in possession.

3. Rule 2015.3 provides that, where the estate controls or owns at least a 20 percent interest of an entity, the estate's interest is presumed to be substantial or controlling. Where the estate controls or owns less than a 20 percent interest, the rule presumes that the estate's interest is not substantial or controlling. The question of substantial or controlling interest is, however, a factual one to be decided in each case.

4. The first Periodic Report required by subdivision (a) of Rule 2015.3 shall be filed no later than five days before the first date set for the meeting of creditors under § 341 of the Code. Subsequent Periodic Reports shall be filed no less frequently than every six months thereafter, until a plan of reorganization becomes effective or the case is closed, dismissed, or converted. Copies of the Periodic Report shall be served on the U.S. Trustee, any committee appointed under § 1102 of the Code, and any other party in interest that has filed a request therefor.

5. The source of the information contained in each Periodic Report shall be indicated.

Specific Instructions

6. Each entity subject to the reporting requirement of Rule 2015.3 shall be listed in the table contained on the first page of the form. Reports for each such entity shall be placed behind separate tabs, and each such report shall consist of three exhibits. Exhibit A shall provide valuation information; Exhibit B shall provide financial statements, and Exhibit C shall provide a description of operations.

Instructions for Exhibit A – Valuation

7. Provide a statement of the entity's value and the value of the estate's interest in the entity, including a description of the basis for the valuation, the date of the valuation, the valuation method used and the source or preparer of the information. This valuation must be no more than two years old.

Instructions for Exhibit B – Financial Statements and Profitability

8. The financial statements may be unaudited. The financial statements should be prepared in accordance with generally accepted accounting principles in the United States ("USGAAP"); deviations, if any from USGAAP, shall be disclosed. Indicate the source or preparer of the information.

9. Exhibit B shall include the following financial statements, and shall indicate the source of the information presented:

(a) A balance sheet dated as of the end of the most recent six-month period of the current fiscal year and as of the end of the preceding fiscal year.

(b) A statement of income (loss) for the following periods:
- (i) For the initial report:
  - a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and
  - b. the prior fiscal year.
- (ii) For subsequent reports, since the closing date of the last report.

(c) A statement of changes in cash flows for the following periods:
- (i) For the initial report:
  - a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and
  - b. the prior fiscal year.
- (ii) For subsequent reports, since the closing date of the last report.

(d) A statement of changes in shareholders'/partners equity (deficit) for the following periods:
- (i) For the initial report:
  - a. the period between the end of the preceding fiscal year and the end of the most recent six-month period of the current fiscal year; and
  - b. the prior fiscal year.
- (ii) For subsequent reports, since the closing date of the last report.

10. The balance sheet contained in Exhibit B-1 may include only major captions with the exception of inventories. Data as to raw materials, work in process, and finished goods inventories should be included either on the face of the balance sheet or in the notes to

the financial statements, if applicable. Where any major balance sheet caption is less than 10% of total assets, the caption may be combined with others. An illustrative example of such a balance sheet is set forth below:

XYZ Company
Balance Sheet
As of_____

Assets	Year to date	Prior Fiscal Year
Cash and cash items	_____	_____
Marketable securities	_____	_____
Accounts and notes receivable (non-affiliates), net of allowances	_____	_____
Accounts due from affiliates	_____	_____
Inventories		
Raw materials	_____	_____
Work in Process	_____	_____
Finished goods	_____	_____
Long-term contract costs	_____	_____
Supplies	_____	_____
LIFO reserve	_____	_____
Total inventories	_____	_____
Prepaid expenses	_____	_____
Other current assets	_____	_____
Total current assets	_____	_____
Securities of affiliates	_____	_____
Indebtedness of affiliates (non-current)	_____	_____
Other investments	_____	_____
Property, plant and equipment, net of accumulated depreciation and amortization	_____	_____
Intangible assets	_____	_____
Other assets	_____	_____
Total Assets	_____	_____

Liabilities and Shareholders'/Partners' Equity	Year to date	Prior Fiscal Year
Accounts and notes payable (non-affiliates)	_____	_____
Payables to affiliates	_____	_____
Other current liabilities	_____	_____
Total current liabilities	_____	_____

Bonds, mortgages, and other long-term debt, including capitalized leases	_____	_____
Indebtedness to affiliates (non-current)	_____	_____
Other liabilities	_____	_____
Commitments and contingencies	_____	_____
Deferred credits	_____	_____
Minority interests in consolidated subsidiaries	_____	_____
Preferred stock subject to mandatory redemption or whose redemption is outside the control of the issuer	_____	_____
Total liabilities	_____	_____
Shareholders' equity	_____	_____
Total liabilities and shareholders'/partners' equity	_____	_____

11. The statement of income (loss) contained in Exhibit B-2 should also include major captions. When any major statement of income (loss) caption is less than 15% of net income (loss) for the most recent fiscal year, the caption may be combined with others. Notwithstanding these tests, *de minimis* amounts need not be shown separately. An illustrative example of such a statement of income (loss) is set forth below:

XYZ Company
Statement of income (loss)
For the periods ending_____

	Year to date	Prior Fiscal Year
Net sales and gross revenues	_____	_____
Costs and expenses applicable to sales and revenues	_____	_____
Gross profit	_____	_____
Selling, general, and administrative expenses	_____	_____
Provision for doubtful accounts	_____	_____
Other general expenses	_____	_____
Operating income (loss)	_____	_____
Non-operating income (loss)	_____	_____
Interest and amortization of debt discount	_____	_____
Non-operating expenses	_____	_____
Income or loss before income tax expense	_____	_____
Income tax expense	_____	_____
Minority interest in income of consolidated subsidiaries	_____	_____
Equity in earnings of unconsolidated subsidiaries and 50 per cent or less owned persons	_____	_____

Income or loss from continuing operations	_____	_____
Discontinued operations	_____	_____
Income or loss before extraordinary items and cumulative effects of changes in accounting principles	_____	_____
Extraordinary items, net of tax	_____	_____
Cumulative effects of changes in accounting principles	_____	_____
Net income (loss)	_____	_____
Earnings per share data	_____	_____

12. The statement of cash flows in Exhibit B-3 may be abbreviated, starting with a single figure of funds provided by operations and showing other changes individually only when they exceed 10% of the average of funds provided by operations for the most recent fiscal year. Notwithstanding this test, *de minimis* amounts need not be shown separately. An illustrative example of such a statement of cash flows is set forth below:

XYZ Company
Statement of cash flows
For the periods ending_____

	Year to date	Prior Fiscal Year
Net cash provided (used) by operating activities	_____	_____
Cash flows from investing activities		
Capital expenditures	_____	_____
Sale of _____	_____	_____
Other (describe)	_____	_____
Net cash provided (used) in investing activities	_____	_____
Cash flows provided (used) by financing activities		
Net borrowings under line-of-credit	_____	_____
Principal payments under capital leases	_____	_____
Proceeds from issuance of long-term debt	_____	_____
Proceeds from sale of stock	_____	_____
Dividends paid/Partner Distributions	_____	_____
Net cash provided (used) in financing activities	_____	_____
Net increase (decrease) in cash and cash equivalents	_____	_____
Cash and cash equivalents		
Beginning of period	_____	_____
End of period	_____	_____

13. Subject to paragraph 11 above, an illustrative example of such a statement of changes in shareholders'/partners' equity in Exhibit B-4 is set forth below:

XYZ Company
Statement of changes in shareholders'/partners' equity (deficit)
For the periods ending

	Year to date	Prior Fiscal Year
Balance, beginning of period	_____	_____
Comprehensive net income		
Net income	_____	_____
Other comprehensive income, net of tax	_____	_____
Unrealized gains (losses) on securities	_____	_____
Foreign translation adjustments	_____	_____
Minimum pension liability adjustment	_____	_____
Issuance of stock	_____	_____
Dividends paid	_____	_____
Balance, end of period	_____	_____

14. The financial information in the financial statements shall include disclosures either on the face of the statements or in accompanying footnotes sufficient to make the information not misleading. Disclosures should encompass, but not be limited to, for example, accounting principles and practices; estimates inherent in the preparation of financial statements; status of long-term contracts; capitalization including significant borrowings or modification of existing financing arrangements; and the reporting entity resulting from business combinations or dispositions. Where material contingencies exist, disclosure of such matters shall be provided.

15. If appropriate, the statement of income (loss) should show earnings (loss) per share and dividends declared per share applicable to common stock. The basis of the earnings per share computation should be stated together with the number of shares used in the computation.

16. In addition to the financial statements required above, entities in the development stage should provide the cumulative financial statements (condensed to the same degree as allowed above) and disclosures required by Statement of Financial Accounting Standards

No. 7, "Accounting and Reporting by Development Stage Enterprises," to the date of the latest balance sheet presented.

Instructions for Exhibit C – Description of Operations

17. The description of operations contained in Exhibit C of this Form should describe the nature and extent of the estate's interest in the entity, as well as the business conducted by and intended to be conducted by the entity, focusing on the entity's dominant business segment(s) including, but not limited to the following as applicable:

- Principal product produced or services rendered and methods of distribution
- Description of the status of a new product or segment if a public announcement has been made or information publicly disseminated
- Sources and availability of raw materials
- Any significant patents, trademarks, licenses, franchises, and concessions held
- Seasonality of the business
- Dependence upon a single customer or a few customers
- Dollar amount of backlog orders believed to be firm
- Exposure to renegotiation or redetermination or termination of significant contracts
- Competitive conditions facing the entity
- Description of properties owned
- Significant legal proceedings
- Material purchase commitments
- Identified trends events or uncertainties that are likely to have a material impact on the entity's short-term liquidity, net sales, or income from continuing operations

18. The source preparer of the information should be indicated.

COMMITTEE NOTE

This form is new. It implements § 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), which requires a chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. The form is to be used when required by Bankruptcy Rule 2015.3, with such variations as may be approved by the court pursuant to subdivisions (d) and (e) of that rule. The form includes instructions and examples of the types of information needed to complete it.

Comparison Chart for Proposed Rules

RULE	Req'd by 2005 Act	Interim Rule	Change From Interim Rule
1005	Yes	No	New Rule
1006	Yes	Yes	None
1007	Yes	Yes	Stylistic revisions & revision to allow postpetition filing of credit counseling cert. in limited circumstances
1009	Yes	Yes	None
1010	Yes (in part)	Yes	New subdivision (b) added
1011	Yes (in part)	Yes	New subdivision (f) added
1015	Yes	Yes	None
1017	Yes	Yes	None
1019	Yes	Yes	Stylistic
1020	Yes	Yes	Stylistic
1021	Yes	Yes	Stylistic
2002	Yes	Yes	Stylistic
2003	Yes	Yes	None
2007.1	Yes	Yes	None
2007.2	Yes	Yes	Stylistic
2015	Yes	Yes	Added new subdivision (a)(6)
2015.1	Yes	Yes	Stylistic
2015.2	Yes	Yes	Stylistic
2015.3	Yes	No	New Rule

3002	Yes	Yes	Amendment to (c)(5) is new. Other changes stylistic only.
3003	Yes	Yes	None
3016	Yes	Yes	Subdivision (d) is new.
3017.1	Yes	Yes	None
3019	Yes	Yes	Stylistic
4002	Yes	Yes	Stylistic
4003	Yes	Yes	New deadline to object to exemptions is set out in subdivision (b)(1), and a new subdivision (b)(2) is inserted in the rule. Subparagraphs in subdivision (b) are renumbered. Subdivision (d) is amended. The amendments in subdivisions (b)(2) and (d) are not related to the 2005 Act.
4004	Yes	Yes	Stylistic
4006	Yes	Yes	Stylistic
4007	Yes	Yes	None
4008	Yes	Yes	New deadline for filing reaffirmation agreements in subdivision (a)
5001	No	No	New amendment
5003	Yes	Yes	Stylistic

5008	Yes	Yes	Stylistic
5012	Yes	Yes	Stylistic
6004	Yes	Yes	Stylistic
6011	Yes	Yes	Stylistic
8001	Yes (in part)	Yes	Subdivision (e) revised to govern withdrawal of election to have district court hear appeal (not required by 1005 Act); addition of subdivision (f)(5)
8003	Yes	Yes	No Change
9006	Yes	No	New Amendment
9009	Yes	No	New Amendment

Bankruptcy Rules Tracking Docket (By Rule Number) 5/19/06

Approved Items – Pending Congressional action (if any)

Suggestion	Effective Date
Rule 1009 Requires debtor to submit corrected social security number	12/1/06
Rule 5005(a)(2) Authorizes bankruptcy courts to require electronic filing by local rule	12/1/06
Rule 5005(c) Adds BAP clerk and district judges to list of officers required to transmit erroneously delivered papers to bankruptcy clerk of court	12/1/06
Rule 7004(b)(9),(g) Clarifies that debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to how the summons and complaint are served on the debtor	12/1/06

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1005 Include all names used by debtor for 8 years in caption; redact an individual's taxpayer ID number	Committee proposal and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)	3/05 - Committee considered, referred to Subcommittee on Privacy, Public Access & Appeals 9/05 - Referred to Forms Subcomt. 3/06 - Committee approved for publication	12/1/08
Rule 1006 Installment payments, waiver of filing fee	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 1007(a),(b),(c) Required documents	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule	12/1/08
Rule 1007(b)(7),(c) Required documents	Interim Rule to implement BAPCPA	3/06 - Committee approved changes in Interim Rule for adoption in 2006 6/06 - Standing Committee agenda	10/1/06
Rule 1009(b) Amended Statement of Intention	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 1010 Service of involuntary, petition for recognition	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08

Rules 1010(b) Rule 7007.1 applied in involuntary and chapter 15 cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication	12/1/08
Rule 1011(a) Response to involuntary, cross border case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 1011(f) Rule 7007.1 applied in involuntary and chapter 15 cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication	12/1/08
Rule 1014 Clarifies that court may act *sua sponte* to dismiss or convert a case	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Approved by Joint Subcommittee 9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval	12/1/07
Rule 1015(b) Cross reference to § 522(b)	Committee proposal (technical amendments) to implement BAPCPA	3/06 - Committee approved for publication	12/1/08
Rule 1017(e) Dismissal or conversion for abuse **NC**	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rules 1019(2) New filing periods in converted case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08

Rule 1020 Small business chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 1021 (new) Health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2002(a),(b),(c),(f),(g),(p),(q) Additional notice requirements	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule	12/1/08
Rule 2002(g)(1) Address for notices	05-BK- D Judge Robert D. Martin Clerk Marcia M. Anderson 10/25/05	10/05 - Sent to chair and reporter 11/05 - Sent to CM/ECF staff	
Rule 2002(g)(5) Notice under § 342(g)(1)	National Bankruptcy Conference to implement BAPCPA	3/06 - Committee approved for publication	12/1/08
Rule 2002(k) Notice to U.S. trustee of petition for recognition	Committee Proposal to implement BAPCPA	3/06 - Committee approved for publication as national rule	12/1/08
Rule 2003(a) Meeting of creditors not convened	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2007.1 Election of trustee in chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2007.2 (new) Appointment of patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08

Rule 2015 Notice by foreign representative	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2015(a)(6) Periodic financial reports by small business debtor	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2015.1 (new) Patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2015.2 (new) Patient transfer in health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2015.3 (new) Periodic reports on related entities	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 2021 Large chapter 11 case management and teleconferences	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/05 - Referred to Joint Subcomt.	
Rule 3001 Procedure for filing excerpts supporting proof of claim	04-BK-A Glen K. Palman for Claims Subcomt. of CM/ECF Working Group 2/19/04	9/04 - Committee considered, referred to Subcommittee on Forms 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Withdrawn by Committee	

Rule 3002(c)(5) Timing issues for notice of newly discovered assets	04-BK-E Judge Dana L. Rasure for Bankruptcy Judges Advisory Group 11/15/04	3/05 - Committee considered, referred to Privacy Subcommittee 9/05 - Deferred pending further study of time periods 3/06 - Committee approved for publication	12/1/08
Rule 3002(c) Time for creditor with foreign address to file proof of claim	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 3003(c) Time for creditor with foreign address to file proof of claim	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 3007(b) Procedure for objection to claim - no affirmative relief at same time	Committee Proposal	9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval	12/1/07
Rule 3007(c)-(f) Omnibus objections to claims	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcomt. 9/04 - Approved in principle by Committee 1/05 - Revised by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes	12/1/07
Rule 3007 Service of objections to claims	Judge Christopher M. Klein	9/05 - Referred to Business Subcommittee 3/06 - Committee took no action	

Rule 3016(b) Combined plan and disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 3016(d) Forms for plan and disclosure statement	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 3017.1 Conditional approval of form disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 3019 Modification of confirmed plan	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 4001 Requirements for cash collateral motions, obtaining credit, and approval of certain agreements	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcomt. 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes	12/1/07

Rule 4002 Debtor's obligation to provide tax returns, personal identification, and other documents	03-BK-D Lawrence A. Friedman 8/1/03 Interim Rule to implement BAPCPA	8/03 - Sent to chair and reporter 9/03 - Committee considered, referred to Consumer Subcomt. 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval (as modified) 4/05 - Committee deferred action 8/05 - Included in Interim Rules 3/06 - Committee approved for publication as national rule	12/1/08
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Committee considered, referred to Consumer Subcomt. 11/04 - Approved by Subcommittee 3/05 - Committee approved in part, referred to Consumer Subcomt. for further study 9/05 - Committee approved for publication	12/1/08
Rule 4003(b) Objection to exemption based on § 522(q)	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 4003(d) Lien holder's objection to avoidance notwithstanding the 30-day limit	04-BK-B Judge Eugene R. Wedoff 2/17/04	9/04 - Committee considered as part of Rule 4003(b) amendment, referred to Consumer Subcommittee 3/05 - Committee considered, referred to Consumer Subcomt. 9/05 - Committee approved for publication	12/1/08

Rule 4004(c) Requirements for discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule	12/1/08
Rule 4006 Notice that case closed without discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 4007 Time to file dischargeability action	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 4008 Filing deadline for reaffirmation agreement	01-BK-E Bankruptcy Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered, referred to subcommittee.. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approval 6/04 - Standing Committee approval 9/04 - Judicial Conference approval 4/05 -Withdrawn from Supreme Court at request of Committee and Executive Committee due to conflicting provisions in bankruptcy reform legislation 3/06 - Committee approved revised draft for publication	12/1/08
Rule 4008 Debtor's § 524(k) statement in support of reaffirmation	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08

Rule 5001(b) Holding court outside the district in an emergency	Committee Proposal	9/03 - Committee approved in principle; further action deferred 9/05 - Committee approved for publication	12/1/08
Rule 5003 Mailing addresses of certain tax authorities	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 5008 (new) Notice regarding presumption of abuse	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 5012 (new) Communications with foreign courts	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 6003 (new) First day orders	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcomt. 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment 3/06 - Committee approval with changes	12/1/07
Rule 6004(g) Sale of personally identifiable information	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08

Rule 6006 Omnibus motions for assumption, rejection, or assignment	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcomt. 9/04 - Approved in principle by Committee 1/05 - Approved by Joint Subcomt. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment 3/06 - Committee approval with changes	12/1/07
Rule 6011 (new) Disposal of patient records	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 7007.1 Corporate ownership statement with initial filing	Committee proposal	9/04 - Committee approval as technical amendment without publication 1/05 - Standing Committee approved publication 8/05 - Published for Public Comment 3/06 - Committee approval	12/1/07
Rule 8001 Direct appeals	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule	12/1/08

Rule 8002(a) Extending the time for appeal	Committee proposal	9/04 - Committee considered, referred to Technology and Cross Border Insolvency Subcommittee 1/05 – Subcommittee recommended taking no action 3/05 - Referred to Technology and Cross Border Insolvency Subcomt. 9/05 - Committee deferred action pending study of time periods in all federal rules	
Rule 8003(d) Authorization of direct appeal as leave to appeal	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule	12/1/08
Rule 9005.1 (new) Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1 1/05 - Standing Committee approved proposed Rule 5.1 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval	12/1/07
Rule 9006 Enlargement and reduction of time	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication with changes as national rule	12/1/08
Rule 9009 References to Interim Rules in Official Forms	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 12/08 - Expires when Interim Rules become national rules	

Rule 9009 Use of form plan and disclosure statement not mandatory	Business Subcommittee to implement BAPCPA	3/06 - Committee approved for publication as national rule	12/1/08
Rule 9011 Attorney conduct	Senators Charles E. Grassley and Jeff Sessions	3/06 - Referred to Attorney Conduct and Health Care Subcommittee	
Rule 9021 Separate Document Requirement	04-BK- Judge David Adams	8/04 - Referred to Committee 9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Privacy, Public Access and Appeals Subcommittee 9/05 - Referred to Privacy, Public Access and Appeals Subcommittee 3/06 - Referred to Privacy, Public Access and Appeals Subcommittee, report in Sept.	
Rule 9037 (new) Template privacy rule	E-Government Act § 205(c)(3)	9/04 - Committee considered and referred to Reporter, Judge Swain 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes	12/1/07
New Rule Representation of corporations in small claims matters	05-BK-A (see also 06-BK-A, 00-BK-D, 98-BK-A) Judge Paul Mannes	9/05 - Referred to Attorney Conduct and Health Care Subcommittee 3/06 - Committee decided to take no action	

New Rules Chapter 15	05-BK-B Judge Samuel Bufford	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency, report in September	
Local Rules Due process for attorneys accused of misconduct	ABA Task Force on Attorney Discipline	9/05 - Referred to Subcommittee on Attorney Conduct and Health Care 3/06 - Committee decided to take no action	
New Rule Representation of corporations when less than $5,000 at issue	06-BK-A (see also 05-BK-A, 00-BK-D, 98-BK-A) Judge Paul Mannes	9/05 - Sent to chair and reporter	
Official Forms 1, 1-Exh. D, 3A, 3B, 4, 5, 6-Summary, 6A-J, 6-Declaration, 7, 8, 9A-I, 10, 16A, 18, 19A, 19B, 22A, 22B, 22C, 23, 24 Implement BAPCPA	Forms Subcommittee to implement BAPCPA	8/05 - Approved by Committee 8/05 - Approved by Standing Committee and Executive Committee as Official Forms 9/05 - Official Forms 1, 22A, and 22C amended by Committee 10/05 - Amended Official Forms approved by Standing Committee and Executive Committee 3/06 - Committee approved for publication with changes as permanent forms 5/06 - Committee approved (by email) publication of new Exh. D to Official Form 1	12/1/08
Official Forms 1, 1-Exh. D, 5, 6-Summary, 6D, 6E, 6F, 6I, 6J, 6-Declaration, 9G, 9H, 9I, 22A, 22C, 23 Statistics, practice under BAPCPA	Forms Subcommittee to implement BAPCPA	3/06 - Committee approved "immediate" changes in several 10/05 forms 5/06 - Committee approved (by email) new Exh. D as "immediate change" to Official Form 1 6/06 - Standing Committee agenda	10/1/06

Official Form 10 Revised to clarify requirements for attachments	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Forms Subcommittee 9/04 - Discussed by Committee, referred to Forms Subcommittee 12/05 - Approved by Subcommittee 3/05 - Committee approved for publication 6/05 - Committee deferred action 9/05 - Referred to Forms Subcomt. 3/06 - Committee approved for publication	12/1/08
Official Form 21 Implement privacy rule	Forms Subcommittee	3/06 - Committee approved for publication	12/1/08
Official Forms 25A, 25B (new) Form plan and disclosure statement	Business Subcommittee to implement BAPCPA	9/05 - Model plan approved in principle 9/05 - Model plan and disclosure statement referred to Business Subcommittee 3/06 - Committee approved for publication	12/1/08
Official Form 25C (new) Periodic financial report by small business debtor	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication	12/1/08
Official Form 26 (new) Periodic report on related entities	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication	12/1/08
Director's Forms 18J, 18JO, 18F, 18FH, 18W, 18WH, 200, 201, 240, 280	Forms Subcommittee to implement BAPCPA	9/05 - Reviewed by Committee 10/05 - Issued by Director of Administrative Office	10/17/05

Director's Forms 240, 281	Forms Subcommittee to implement BAPCPA	3/06 - Reviewed by Committee 9/05 - Referred to Forms Subcommittee	

Inactive Items / Historical Information

Suggestion	Docket No., Source & Date	Status
Rules 3020, 4001(a) Automatic stay terminated at confirmation	05-BK-C Nicholas P. Spallas 9/30/05	10/05 - Sent to chair and reporter **NO FURTHER ACTION**
Rule 4003(b) Objection to exemptions in converted case	05-BK-B Judge Samuel L. Buford 9/15/05	9/05 - Sent to chair and reporter **NO FURTHER ACTION**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee deferred action **FURTHER ACTION MAY BE APPROPRIATE**
Official Form 6, Schedule I Income of non-filing spouse disclosure	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval, chair given discretion to refer to Forms Subcommittee if legislation passes 8/05 - Included in revision for reform legislation **NO FURTHER ACTION**

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 8-10, 2006
Chapel Hill N.C.

Draft Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
Circuit Judge R. Guy Cole, Jr.
District Judge Irene M. Keeley
District Judge William H. Pauley III
District Judge Richard A. Schell
District Judge Laura Taylor Swain
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
K. John Shaffer, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Circuit Judge Edward Leavy, former chairman
District Judge Adrian G. Duplantier, former chairman
Bankruptcy Judge Paul Mannes, former chairman
Bankruptcy Judge Thomas Small, former chairman
Bankruptcy Judge Eric L. Frank, former member
Professor Alan N. Resnick, former reporter, former member
Howard L. Adelman, Esquire, former member
Circuit Judge Harris L. Hartz, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Professor Edward J. Janger, advisor to the Committee
Professor Daniel R. Coquillette, reporter to the Standing Committee
Professor Daniel J. Capra, reporter to the Advisory Committee of Evidence Rules (participated by telephone).
Peter G. McCabe, secretary of the Standing Committee
Donald F. Walton, Acting Deputy Director, Executive Office for U.S. Trustees (EOUST)
Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey

Professor Melissa B. Jacoby, advisor to the Committee
Interim Dean Gail B. Agrawal, University of North Carolina School of Law
Patricia S. Ketchum, advisor to the Committee
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen Scott Myers, Bankruptcy Judges Division, Administrative Office
Elizabeth Wiggins, Federal Judicial Center (FJC)
Philip S. Corwin, Butera & Andrews, Washington, D.C.
Jeffrey A. Tassey, Tassey & Associates, Washington, D.C.
Karl F. Kaufman, Sidley Austin Brown & Wood, Washington, D.C.

The following person was unable to attend the meeting:

Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)

The following summary of matters discussed at the meeting should be read in conjunction with the memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed the members, former members, liaisons, advisers, staff, and guests to the meeting. He commended the staff of the Administrative Office on their efforts in compiling and organizing many changes to the agenda material made just days before the meeting. The Chairman specially praised the support provided by Gail Mitchell and Judith Krivit, and he commended John Rabiej, James Isida, James Wannamaker, and Scott Myers on their efforts as well.

The Chairman directed the Committee's attention to the minutes of the previous two meetings. **The Committee voted without objection to approve the minutes of the September 2005 meeting in Santa Fe. It also approved minor corrections to the minutes of the March 2005 meeting in Sarasota, Florida.**

The Chairman and Mr. McCabe briefed the Committee on the January 2006 meeting of the Standing Committee. Copies of the Standing Committee minutes were distributed to the attendees.

Judge Klein reported on the most recent meeting of the Bankruptcy Administration Committee. He said that none of the issues under consideration by the Bankruptcy Administration Committee had any bankruptcy rule implications.

Judge Klein also reported on most recent meeting of the Committee on Evidence Rules. He stated that the Evidence Rules Committee is not currently proposing any amendments to the rules.

Judge Walker reported on the most recent meeting of the Committee on Civil Rules. He discussed revisions of Civil Rules 8, 15, 26, 33 & 36, and said that the Civil Rules Committee is currently working on two broad topics: (1) setting forth a uniform computation of time under the rules; and (2) changes to rule 56 and notice pleading.

The Chairman remarked that due to late-filed comments on certain rules and forms, a number of agenda items would be discussed "out of order." He explained that the time-frame between the end of the comment period and the spring meeting this year was very short, and that there had been no published cutoff date for submitting comments to the interim rules. As a result, many comments were received after the agenda materials were initially compiled, and consideration of some of the new comments required changes in the organizational structure of the agenda materials. To avoid a similar problem next year, he suggested possibly moving the spring meeting from March to April.

Action Items

Rules Published in 2005 (Agenda Item 3)

In memos dated February 6, 2006, February 16, 2006, and February 22, 2006, the Reporter described the public comments and the comments of the Style Subcommittee of the Standing Committee to proposed amendments published in 2005 to Rules 1014, 3001, 3007, 4001, 6006, 7007.1 and proposed new Rules 6003, 9005.1 and 9037. The Chairman said that discussion of the proposed changes to Rule 9037 regarding privacy would be considered on Thursday, when Professor Capra would be able to participate by telephone.

Rules 7007.1 and 9005.1. Because there were no comments to the proposed changes to Rule 7007.1 regarding the time for filing a corporate ownership statement, and proposed Rule 9005.1 regarding the applicability of FRCP 5.1 in cases under the Code, the Chairman entertained motions to approve each rule as published. **The motions to recommend final approval of Rules 7007.1 and 9005.1 as published carried without dissent.**

Rule 3001 and Form 10. The Chairman then took up the proposed changes and comments to Rule 3001 and asked to Committee to focus on the Reporter's February 22, 2006, memo (at Agenda Item 3(a)). The Chairman noted that changes to Official Form 10 would be considered in conjunction with the proposed changes to Rule 3001.

The Reporter summarized the proposed changes to Rule 3001 as: limiting the length of attachments to a proof of claim form (generally 25 pages, and 5 pages where the attachment evidences the perfection of a security interest); a requirement for excerpts and a summary to describe what would otherwise be voluminous attachments; and a change in the rule to require submission of "copies" of a writing as opposed to "original or duplicates" to evidence a claim.

The Reporter summarized the comments into three categories: (1) no change is needed; (2) the costs in preparing a summary and excerpting relevant portions of the writing would be too expensive; and (3) the five-page limit for evidence of perfection of a security interest was too short.

Some members of the Committee agreed that there may be a benefit to limiting attachments to preserve court resources, such as limited bandwidth available to upload and store voluminous attachments, but that the need to excerpt portions of the writing and to create a summary whenever the arbitrary page limit was reached would be costly to claimants. Professor Resnick and Judge Wedoff suggested withdrawing the rule because they thought it might create a trap for the unwary creditor and because they thought technology would catch up.

The Reporter noted that withdrawing all proposed amendments to Rule 3001 would leave in effect a provision in the rule that allows claimants to submit an original writing (as opposed to a copy or duplicate) as evidence a claim. He pointed out that because of electronic filing many courts have sought authorization to destroy any paper claims and attachments after they are scanned and placed on the electronic claims docket, and that claimants may not realize that their original documents may not be returned. Therefore, he suggested withdrawing only the proposed amendments that deal with page limits.

Mr. Waldron commented that the page limitation changes were suggested not only to preserve court resources, but because some "bulk claims filers" had complained that many courts already impose non-uniform limits on attachment length by local rule or general order. The proposed amendments to the national rule would make any limitations uniform.

The Chairman summarized the Committee's discussion as two alternative motions: to withdraw the proposed amendments to 3001 in their entirety; or withdraw only the page limit proposals. **The Committee voted without dissent to withdraw all proposed amendments to Rule 3001.**

Ms. Ketchum summarized the proposed changes to Form 10. The changes are described in detail at Agenda Items 9(b) and 9(c).

In light of the Committee's decision to withdraw the proposed amendments to Rule 3001, Ms. Ketchum indicated the changes to Form 10 dealing with page limits would be deleted. Ms. Ketchum noted, however, that the current version of Form 10 at box 7 admonishes the claimant: "DO NOT SEND ORIGINAL DOCUMENTS" as an attachment to the claim. She said that this directive may be inconsistent with current Rule 3001, which, as the Reporter pointed out, allows the claimant to attach either original *or* duplicate documents in support of the claim. Several members were in favor of some sort of warning on the claim form because it was likely that any documents submitted to the court would be destroyed after they were scanned into electronic versions. Professor Resnick suggested revisiting Rule 3001 and removing the reference to original documents in that rule. The consensus was that there was no need to revise the rule, but that the language on Form 10 should be strengthened to warn that any attachments to the proof of claim would be destroyed. A motion was made to recommend changing the admonishment to

"DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING"; to approve all stylistic changes; and to remove the proposed language regarding page limits to attachments. **The motion carried without opposition.**

Rule 1014. The Joint Subcommittee on Venue (the "Joint Subcommittee") reviewed the comments to the published amendments to Rules 1014, 3007, 4001 and 6006 and new Rule 6003. The Reporter's memo of March 1, 2006, at Agenda Item 3(a) discusses the Joint Subcommittee's recommendations. The Joint Subcommittee noted that no comments have been received with respect to the proposed amendments to Rule 1014 and recommended that the rule be promulgated as published. **A motion to recommend final approval of the published amendments to Rule 1014 carried without opposition.**

Rule 3007. The Reporter and Mr. Shaffer reviewed the comments to proposed Rule 3007 amendments dealing with omnibus claims objections and described the recommendations made by the Joint Subcommittee concerning the comments. The Reporter's March 1, 2006, memo at Agenda Item 3(a) contains a black-line version of the changes recommended by the Joint Subcommittee.

The Joint Subcommittee rejected comments that suggested allowing the local court to "opt in" or "opt out" of the proposed amendments to Rule 3007 because it believed the rule was already limited in scope and that additional discretion would frustrate the goal of creating a uniform, national standard for omnibus claims objections. In discussing the proposed changes, a committee member suggested changing the word "replaced" in 3007(d)(3) with "amended."

Judge Wedoff moved that the Committee recommend final approval of Rule 3007 with the changes suggested by the Joint Subcommittee and with the substitution of "amended" for "replaced" in 3007(d)(3). **The motion carried without opposition.**

Rule 4001. The Reporter's March 1, 2006, memo at Agenda Item 3(a) discusses the Joint Subcommittee's review and recommendations with respect to the Rule 4001 comments, and contains a black-line version of the rule illustrating many of the proposed changes.

As published, the changes to Rule 4001 required that motions under subsections (b), (c), and (d) contain an introductory summary no longer than three pages. A comment by the National Bankruptcy Conference (NBC) suggested that the three-page cut-off was too limiting, and that instead the rule should simply require "a brief introductory statement." The Joint Subcommittee rejected this change as too open-ended, but, as an alternative, suggested changing the proposed page limit for the introductory statement from three to five pages.

The Joint Subcommittee supported suggestions that the introductory statement contain cross-references to the material provisions in the motions or proposed orders, and that motions for authority to obtain credit under subsection (c) should explain the extent to which any interim relief might impact the estate if the court later refuses to grant final relief as requested.

The NBC and Judge Marvin Isgur recommended that service under the proposed changes to 4001(b), (c), and (d) be expanded to include service on persons who have requested service of all pleadings. The Joint Subcommittee rejected this suggestion because it would create an inconsistency with the service requirements under subsection (a) of the rule, and because including a like change in subsection (a) would require republication and would delay adoption of the existing recommended changes.

The Joint Subcommittee considered the NBC's objection to an explicit reference to Rule 9024 in the proposed changes to 4001. In light of the NBC's comments, the Joint Subcommittee recommended removing the reference to Rule 9024, but suggested language to make clear that the court may grant "appropriate relief if it determines that the introductory statement in the motion did not adequately disclose a material element of the agreement or proposed order."

After an initial discussion, **the Committee voted to recommend the following changes to the proposed amendments to Rule 4001:**

- **the page limit for the introductory statements contemplated in subsections (b), (c), and (d) was changed from three to five pages;**
- **the phrasing regarding introductory statements was changed from "shall include an introductory statement ..." to "shall consist of, or if ... more than five pages ... begin with, a concise statement ..."** (to address Judge Isgur's concern that if the entire motion was five pages or less, that a separate introduction need not be set out).

The Committee agreed with the Joint Subcommittee's reasoning and **voted not to recommend that service in subsections (b), (c), and (d) be expanded to include parties requesting service.**

The changes to the rule as published included a new subsection (c)(1)(B) that contains a list of certain significant provisions, which, if present in the motion, must be listed in the introductory statement to draw attention to their existence. The new subsection also required the movant to "explain why" any of the provisions on the (c)(1)(B) list, if present in the proposed credit agreement or order, were necessary. The NBC recommended that the "explain why" language be removed. The Joint Subcommittee agreed with NBC's recommendation. There was divergence of opinion as to whether an "explain why" provision would elicit useful information, and **the Committee voted to omit such a requirement in the rule.**

The NBC also recommended that the list of significant provisions to be disclosed in the introductory statement of a motion to obtain credit be expanded to require disclosure of any provisions: setting deadlines to file a plan or disclosure agreement; to obtain disclosure statement approval; or for the entry of a confirmation order. The Joint Subcommittee supported the NBC's recommendation. **The Committee agreed and voted to recommend augmenting the list at subdivision (c)(1)(B) to require disclosure in the introductory statement of "the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order."**

There were diverging opinions about the proposed new Rule 4001(c)(1)(C). As published, subsection (c)(1)(C) made explicit reference to the applicability of Rule 9024 if a court determines later in the case that an introductory statement did not adequately disclose material elements of the credit agreement. The NBC commented that a specific reference to Rule 9024 in Rule 4001 could be construed to mean that applicability of Rule 9024 was somehow different in other rules. The Joint Subcommittee suggested replacing the Rule 9024 reference with: "the court may grant appropriate relief if it determines that [the summary] did not adequately disclose a material element of the [credit agreement]." Some committee members said that even the Joint Subcommittee's proposal inappropriately created an inference that the court's ability to revisit an order or action was different in Rule 4001 than in other rules. **Upon motion, the Committee voted to recommend deleting subdivision (c)(1)(C) from the proposed amendments to the Rule 4001.**

The Committee voted to recommend final approval of the proposed changes to Rule 4001 (as amended at the meeting) without dissent. The Reporter distributed a copy of the rule with revisions to the Committee on Friday.

Rule 6003 ("First Day Orders"): The Joint Subcommittee reviewed the comments to Rule 6003 and agreed with suggestions that motions to reject unexpired leases should not be limited during the first 20 days of a bankruptcy case. The Joint Subcommittee noted that the standard to allow rejection of a lease was easily met, and almost all such motions are allowed. Accordingly, prohibiting the debtor from rejecting leases during the first 20 days of the case created the possibility of unnecessary rental obligations without any corresponding benefits. **The Committee agreed with the Joint Subcommittee and voted to recommend final approval of the proposed changes to Rule 6003 as published after deleting references to the rejection of executory contracts or unexpired leases.**

Rule 6006 (Omnibus Motions to Assume, Assign or Reject Executory Contracts and Leases): The published amendment to Rule 6006 added a new subsection setting procedures for and limiting the use of omnibus motions to assume, reject or assign multiple executory contracts or unexpired leases in certain circumstances. The Joint Subcommittee recommended a change in the published language to include motions "to assume, but not assign to more than one assignee unexpired leases of real property." **The Committee voted to recommend final approval of the proposed amendments to Rule 6006 as published, with the changes suggested by the Joint Subcommittee.**

Standing Committee Style Subcommittee Recommendations regarding the Published Rules (Rules 3001, 3007, 4001, 6003, 6006): The Style Subcommittee of the Standing Committee suggested a number of changes to the published rules as set out at Agenda Item 3(b). The Reporter reviewed the suggested changes and made recommendations in his memo, also set out at Agenda Item 3(a). **The Committee voted to recommend approval of all style changes supported in the Reporter's memo.**

Rule 9037: The Reporter and Professor Capra (who participated by telephone), discussed the comments on Rule 9037 (the bankruptcy rule version of the E-Government Rule) and recommended changes. The basis for discussion was The Reporter's March 6, 2006, memo

distributed at the committee meeting, which contained a copy of the rule with suggested amendments. The primary changes in March 6 version of the rule as compared to the rule as published were:

- Published subdivision (d)(1) became (a)(2)
- Published subdivisions (c) and (d) were combined into a new (c)(1) and (c)(2)
- An exemption from the redaction requirement was added for financial account numbers in forfeiture actions
- A new subdivision was proposed at the end of the rule (subdivision (g)), to state explicitly that parties and their counsel have the duty to redact documents, not the clerk or court reporters
- Stylistic changes offered by the Style Subcommittee of the Standing Committee

The Reporter reviewed the newly proposed subdivision (g), (Duty to Redact) at lines 61-69, which had been proposed by the Court Reporters Association. The first sentence in subdivision (g), which affirmatively puts the responsibility for redaction on the parties and their counsel, was supported by the Federal Magistrate Judges Association. The Reporter recommended deleting all of subdivision (g) because it was not the sort of position normally taken in the Rules. The Committee reviewed the changes set out in the March 6 memo. After discussion, **the Committee approved the changes in Rule 9037(a)(1) and additionally changed lines 8-9 to read "and an individual's tax identification number." It approved the new subdivision (a)(2) and corresponding deletion of former subdivision (d)(1). It approved the insertion of "whose decision becomes part of the record" in subdivision (b)(2) and it approved the insertion of subdivision (b)(5) (redaction requirement in forfeiture proceedings) at lines 28-29. Finally, it voted to delete proposed subdivision (g) and voted to recommend final approval of the rule with the changes discussed above.**

Interim Rules (Agenda Item 4)

The Chairman told the Committee that there has been almost uniform adoption of the Interim Rules, as shown by Agenda Item 4(b), a chart summarizing adoption sorted by court. The Chairman said that since adoption, comments had been received only on Rules 1007, 1015, 2002, 2015, 2015.3, 3016, and 8001. The Reporter prepared a summary of the comments at Agenda Item 4(c).

The Chairman moved that the Committee recommend publishing as proposed national rules those Interim Rules that received no comments. **The Committee voted without dissent to recommend publishing for public comment as proposed new national rules all Interim Rules that received no comments, namely: the proposed amendments to Rules 1006, 1010, 1011, 1017, 1019, 1020, 2003, 2007.1, 3002, 3003, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 6004, 8003, 9006 and proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 5008, 5012 and 6011.**

Rules 1010, 1011, *Agenda Item 6(b)*: Although not part of the interim rule changes, the Reporter recommended amending Rules 1010 and 1011 to make Rule 7007.1 (requirement to file ownership statement) applicable in involuntary petitions. He argued that the process of filing an

adversary proceeding is akin to filing a complaint and that Rule 1010 already requires the petitioning creditors to serve the summons and a copy of the involuntary petition in the manner of service of a summons and complaint. The Reporter's suggested revisions to Rules 1010 and 1011 are set out at Agenda Item 6(b). **The Committee approved the Reporter's suggested changes to Rules 1010 and 1011 with minor stylistic changes to Rule 1010, and deletion of the last sentence in the Committee Note for Rule 1011, and voted to recommend the rules be published for public comment.**

Rule 1007: The Reporter described a number of problems related to the new requirement for individual debtors to complete credit counseling prepetiton and file the appropriate certificate. In his February 24, 2006, memo at Agenda Item 4(c), the Reporter recommended: changing subdivision (b)(3) of the rule to permit the debtor to file a statement that he or she had completed credit counseling but had not received the certificate yet; and adding a new provision to subdivision (c) allowing the debtor to file the certificate within 15 days after commencement of the case if the new provision in subdivision (b)(3) was applicable. The Reporter also proposed a new Director's Form that clerks could use to apprise debtors that filing a case without first completing the credit counseling requirement could result in case dismissal, the payment of a new filing fee for a subsequent case, and a limit of the automatic stay in the subsequent case.

The Committee supported the proposed amendments to the rule with suggested changes to the proposed language at new subdivision (b)(3)(B). Judge Wedoff advocated language changes to the Reporter's suggested form, as well as making the form an Official Form that the debtor would be required to complete and file with the petition. **After discussion, the Committee voted to recommend reformatting subdivision (b)(3) into (b)(3)(A) – (D) and adding new language at subdivision (b)(3)(B).**

At the Chairman's suggestion, Judge Wedoff agreed to draft a proposed official form for the Committee's consideration, and agreed to make changes to subdivision (b)(3) that would require use of the new form. Judge Wedoff's revisions were distributed the following day and **the Committee voted 12-1 to recommend subdivision (b)(3) and proposed new Official Form 23A, as revised by Judge Wedoff. The Committee also recommended redesignating Official Form 23 (a "Statement of Completion" signed by the debtor) as Form 23B.** After the meeting was completed, some members suggested additional stylistic changes to newly designated Form 23A, and suggested redesignating it as Exhibit D to the petition, to help ensure that debtors would not confuse it with the Statement of Completion form. **The Committee voted by e-mail to approve the stylistic changes to the new form, and changed its designation to Exhibit D of the petition. The Committee also amended its prior vote and voted to leave the designation for Form 23 unchanged.**

The Reporter discussed a problem raised by Judge Karen Overstreet regarding completion of the approved financial management course by individual debtors in chapter 7 and 13. Some debtors, rather than filing the Official Form 23 as required by Interim Rule 1007(b)(7), file instead a certificate created by the agency performing the personal financial management course. Judge Oversteet suggested amending subdivision (b)(7) to allow alternative filings, either Official Form 23, or a "certificate of completion" generated by the provider.

The Reporter recommended that no change be made to the subdivision (b)(7) because the problem will likely resolve itself as practitioners and debtor education providers become more familiar with distinctions under the Code between prepetition credit counseling and postpetition debtor education. **The Committee agreed with the Reporter's recommendation.**

The Committee voted to recommend that the new Exhibit D and all recommended changes to Rule 1007 discussed above be published for public comment, and additionally that the new Exhibit D go into effect October 1, 2006. The Committee also recommended that the proposed Rule 1007 changes be incorporated into Interim Rule 1007 to be recommended to the courts for adoption as a local rule effective October 1, 2006.

Rule 2002: The Reporter discussed a request made by the NBC that a mechanism be created in the Rules to implement new creditor noticing requirements under § 342(f) and (g) of the Code, added by BAPCPA. The new Code provisions allow a creditor to treat a notice as potentially ineffective until it is received by a person or subdivision that the creditor has designated to receive notices under the Bankruptcy Code so long as the creditor has established "reasonable procedures" to ensure that notice is sent to the correct person and organizational subdivision. But the additions to § 342 do not describe how a creditor establishes it has "reasonable procedures" in place if it wishes to assert that a particular notice was not effective under § 342(g).

In his February 24, 2006, memo at Agenda Item 4(c), the Reporter proposed language to be included in a new Rule 2002(g)(5) that would provide creditors with procedures to comply with § 342(f) and (g). After discussion, Judge Wedoff volunteered to rewrite the proposed language to reflect comments from the Committee. A revised version of Rule 2002(g)(5) with a proposed Committee Note was distributed to the Committee on Thursday. **The Committee voted to recommend the proposed Rule 2002(g)(5) and the proposed Committee Note as revised by Judge Wedoff with minor stylistic changes.** The stylistic changes were incorporated into a final draft of the rule distributed at the meeting.

Referencing Agenda Item 4(h), the Chairman and the Reporter outlined draft chapter 15 rules proposed by Judge Samuel Bufford. The proposed chapter 15 rules were comprehensive and would be relevant to many of the changes addressed in Interim Rules 2002(p) and (q), 3002(c)(6), and 5012.

Because of time constraints, and because there are relatively few chapter 15 cases, most of which are administered by sophisticated counsel, the Chairman recommended that Judge Bufford's proposed rules first be considered by a subcommittee before review by the full Committee. The Reporter agreed with this approach, but believed that some of Judge Bufford's suggestions could be addressed by changes to existing rules.

In his February 8, 2006, memo at Agenda Item 4(h), the Reporter suggested changes to Rule 2002 that would address some of the concerns raised by Judge Bufford. At page 9 of his memo, the Reporter added new paragraphs 3 and 4 to Rule 2002(p) which, if adopted, would require that notice to a foreign creditor be given in the official language of the country to which the notice is sent, and that notice of a creditor with a foreign address be delivered in the same

manner that notices in legal proceedings are delivered in the foreign country. However, the Reporter did not recommend the changes because he believed the requirements could be unnecessarily expensive for the debtor.

A number of committee members said that the proposed notice might not even be effective. For example, if all the transactions between the debtor and the foreign creditor were conducted in English, or some other language that was not the "official language" of the creditor's country, requiring notice in the "official language" of the creditor could be less effective than if the notice was provided in English. A member suggested that there could also be problems if the creditor was from a country with more than one "official language." **The Committee voted not to amend Rule 2002(p) with the proposed new paragraphs 3 and 4.**

The Reporter did recommend amending Rule 2002(q)(1) and (2) to include the United States trustee in the list of entities who must receive notice of a petition for recognition, or of a court's intention to communicate with foreign courts or foreign representatives. The Committee agreed that the United States trustee should receive notice of these events, but some members thought it would be more appropriate to amend 2002(k), which already contained a list of events that required notice to the United States trustee. **On motion, the Committee rejected the Reporter's proposed amendment to Rule 2002(q) and instead recommended adding Rule 2002(q)(1) and (2) to the list in Rule 2002(k). The Chairman referred Judge Bufford's proposed chapter 15 rules to the Subcommittee on Technology and Cross Border Insolvency.**

The Committee voted to recommend that the proposed changes to Rule 2002 as discussed above be published for public comment.

Rules 4008; 4004(c)(1); 9006(b)(3) and (c)(2): Judge Wedoff discussed a need to amend Rule 4008 to improve clarity, and to ensure that a discharge was not entered before the court reviewed, and, if necessary, held a hearing, with respect to any reaffirmation agreements. **The Committee approved the proposed amendments to Rule 4008 as set out at Agenda Item 7(b), with minor stylistic changes, and recommended publishing the rule for public comment.** A version with stylistic changes was distributed to the Committee the next day. **The Committee also voted to amend Rule 9006(b)(3) and (c)(2) by adding Rule 4008 to the respective lists in those rule subdivisions, and to recommend publishing the changes for public comment.**

Judge Wedoff also recommended at Agenda Item 7(b) that Rule 4004(c)(1) be amended by adding a new subdivision (K) that would provide for entry of the discharge unless a motion to extend the time to file a reaffirmation agreement under 4008(a) was pending. However, the Committee failed to consider the proposed change to Rule 4004(c)(1) during the meeting. **After the meeting, the Committee approved the proposed addition of subdivision (K) by e-mail and recommended publishing Rule 4004(c)(1) as amended.**

Rule 8001, *Agenda Item 4(g)*: Judge Klein referred the Committee to the Reporter's February 3, 2006, memo at Agenda Item 4(g) discussing three proposed changes to Rule 8001.

Judge Klein first discussed a technical revision at subdivision f(1) (lines 23-25 of the rule as set forth in The Reporter's memo), that deleted the reference to the temporary procedural requirements set out in the uncodified provision of BAPCPA. Judge Hartz discussed some problems with use of the word "effective" in the change. **After discussion, the Committee voted to recommend the change to subdivision (f)(1) as set out in the Reporter's memo to be published for public comment.**

Judge Klein next discussed a new subdivision (f)(5) proposed to reinforce the idea that certification by the lower court does not mean the court of appeals will exercise its discretion and accept the case. In effect, the new (f)(5) requires the proponent of the direct appeal to seek permission from the court of appeals in accordance with F.R.App.P.5. There was considerable discussion regarding the proposed language for (f)(5) and some members thought that the new provision was unnecessary. No member moved to withdraw the proposed amendment in its entirety, however, and the Reporter incorporated the suggested changes into a rewrite that was distributed to the Committee the next day. The primary change to the proposed language was to require the party desiring to pursue the direct appeal to seek permission from the appellate court no later than 30 days after certification by the lower court. **The Committee voted to recommend for publication for public comment, the proposed subdivision (f)(5) as revised.**

The last item Judge Klein discussed was a change to subdivision (e) of the rule which redesignated (e) as (e)(1) and created a new (e)(2). The new (e)(2) provides a procedure for transferring an appeal that was first made to the district court to the appropriate bankruptcy appellate panel. It explicitly recognizes the district court's authority to transfer an appeal to the appropriate bankruptcy appellate panel if all the parties seek the transfer, but also recognized the district court's authority to retain jurisdiction despite a transfer request. Judge Klein explained that the proposed addition was designed to prevent strategic behavior by the parties and to prevent the waste of judicial resources. **The Committee voted to recommend for publication for public comment, the redesignation of subdivision (e) as (e)(1) and the addition of subdivision (e)(2).**

Agenda Item 5. Report by the Attorney Conduct and Health Care Subcommittee

Judge Schell reported on two items referred to the Attorney Conduct and Health Care Subcommittee at the Santa Fe Committee meeting. The first issue concerned a June 21, 2005 letter from the ABA Task Force on Attorney Discipline, and the second issue concerned a proposal by Judge Paul Mannes to allow corporate creditors to be represented by non-attorneys where the claim amount is small.

In its letter, the ABA Task Force noted that BAPCPA imposes new duties on individual debtor attorneys in chapter 7 of "reasonable investigation," and "inquiry." The ABA Task Force is concerned about how these new duties might impact issues of attorney discipline, suspension, and disbarment. It suggests that the Committee include in the Federal Rules of Bankruptcy Procedure a recommendation that each bankruptcy court consider implementing an appropriate review and discipline process (or review such processes already in place) with the new attorney

duties in mind and with an aim to protect the rights of both the attorneys and debtors likely to be impacted by the statutory requirements.

The subcommittee recommended no action on the Task Force's proposal for several reasons: (1) the proposal is beyond the scope of the Committee, which is to recommend rules of bankruptcy procedure; (2) Rule 9011 already provides a procedure to discipline attorneys in cases; and (3) procedures for disciplining attorneys are generally promulgated by the district court, not the bankruptcy court.

The subcommittee also recommended no action on Judge Mannes's proposal because there is a significant body of case law prohibiting corporate entities from appearing in federal court without counsel. The subcommittee also believed that Congress may have implicitly addressed the matter when it amended § 341(c) with BAPCPA to allow some unrepresented corporate creditors to appear and be heard at the meeting of creditors. The subcommittee concluded that Congress' express approval of unrepresented corporate creditors at a § 341 meeting arguably implies it decided not to allow such creditors to appear in other aspects of the case without an attorney. **The Committee agreed with the subcommittee and rejected: (1) the proposal of the ABA Task Force on Attorney Discipline to make suggestions to bankruptcy courts regarding attorney discipline; and (2) Judge Mannes's proposal to allow the participation of corporate creditors without attorneys in cases where the claim amount is small.**

Report of the Business Subcommittee; Small Business Forms

The Reporter's February 4, 2006, memo, at Agenda Item 6(c), provides an overview of the Business Subcommittee's work. As described in the memo, the subcommittee proposed three new official forms: Form 25B, Small Business Disclosure Statement; Form 25C, Periodic Financial Reporting Form for Small Business Debtors; and Form 26, Reporting Form for Related Entities in which the Debtor Holds a Substantial or Controlling Interest. In addition, the subcommittee proposed minor changes to Form 25A, Small Business Plan (previously recommended for publication at the Committee's Santa Fe meeting). The subcommittee also proposed amendments to Bankruptcy Rules 2015, 2015.2, 3016, 9009 and a new Rule 2015.3. Judge Swain and Professor Janger reviewed the Business Subcommittee's proposals.

Rule 2015(a)(6), *Agenda Item 4(e)*: Professor Janger said that the proposed addition of subdivision (a)(6) to Rule 2015 was necessary to implement new requirements set forth in BAPCPA that a small business debtor submit certain periodic reports to the trustee. In its review of the rule, the Committee changed "15 days" at line 14 to "20 days" and added the following sentence to the end of 2015(a)(6): "The obligation to file reports under this subdivision terminates on the effective date of the Plan, dismissal, or conversion of the case." The Committee added the following to the end of the Committee Note: "Reporting under this rule does not relieve the debtor or the trustee of any other obligations to provide information or documents to the United States trustee." **The Committee without objection voted to recommend the proposed amendment and Committee Note for publication for public comment.**

Form 25C, *Agenda Item 6(c)(4)*: Professor Janger explained that the subcommittee designed new Official Form 25C "Small Business Operating Report," to collect the information required by proposed Rule 2015(a)(6). Professor Resnick suggested several stylistic changes, including globally changing "you" to "the debtor" and "did you" to "have you." A number of members thought that the "Projections" table on page four should be redesigned to report whether actual financial numbers were higher or lower than projected numbers. And Judge Wedoff suggested regrouping certain questions so that negative information was easier to identify. **Upon motion, the Committee voted to recommend Official Form 25C for publication for public comment, after review by the Style Subcommittee.**

Rules 3016(d) and 9009, *Agenda Items 4(e) and 6(c)(6)*: Professor Janger explained that although the small business plan and disclosure statement forms developed by the Business Subcommittee were proposed as official forms, such forms are not statutorily required. Accordingly, the subcommittee recommended adding a subdivision (d) to Rule 3016 that allows the court to approve plans and disclosure statements that conform to the official forms or to approve forms used by local rule. It also recommended amending Rule 9009 to start with the phrase, "Except as provided in Rule 3016(d) ...," to allow for permissive use of the new forms. Mr. Walton and Judge Wedoff argued that § 1125(f)(2) of the Code and § 433 of BAPCPA require use of the new official forms. **After further discussion, the Committee voted to recommend the addition of Rule 3016(d), and the changes to Rule 9009 for publication for public comment.**

Rule 3016(b), *Agenda Item (4)(f)*: The Reporter suggested a new change to Rule 3016(b). As amended by the Interim Rules, Rule 3016(b) addresses a change in the Code that allows the plan document to also serve as the disclosure statement in a small business case. To comply with the rule, the plan proponent must specially designate the document so that parties will know that a separate disclosure statement will not be filed. The Reporter suggested changing the new language in 3016(b) to make clear that the *court* must determine that the document filed can serve both as a plan and disclosure statement, and that the proponent's mere designation of the document as a plan and disclosure statement does not end the matter. **The Committee voted to recommend Rule 3016(b) for publication for public comment *without* the Reporter's suggested change.**

Form Small Business Plan, *Agenda Item 6(c)(1)*: Professor Janger described minor changes to the small business plan previously approved by the Committee last fall, including a change in the caption, and the addition of section 3.03 to the plan (regarding priority tax claims). Additionally, the Business Subcommittee drafted and recommended a Committee Note for the form plan. The Committee suggested changing the caption so that it included the name of the proponent and the date of the submission (i.e., "*Debtor's* Plan of Reorganization dated _____"). Mr. Walton suggested that the plan should be mandatory, but the Chairman rejected the motion as having been previously considered and voted on. **The Committee approved the plan and official comments with changes, and voted without opposition to publish the form plan for public comment.**

Small Business Disclosure Statement (Form 25B), *Agenda Item 6(c)(2)*: Judge Swain and Professor Janger provided an overview of the process the Business Subcommittee took in developing its recommendation for a form disclosure statement. The new Form 25B was developed over the course of many subcommittee conference calls and represented the input of all the subcommittee members including considerable input from John Byrnes of the EOUST.

Professor Janger described the subcommittee's belief that there were three basic objectives of the new forms: (1) to provide adequate information to creditors, both sophisticated and unsophisticated; (2) to provide information to help the judge to evaluate the plan's compliance with § 1129 of the Code; and (3) to help an unsophisticated debtor's counsel comply with the statutory confirmation requirements. Professor Janger said that the new form was a product of compromise and that the majority of the subcommittee believed it met the objectives set by Congress to create a form to balance: (1) the reasonable needs of the courts, the United States trustee, creditors, and other parties in interest for reasonably complete information; and (2) economy and simplicity for debtors.

Mr. Walton spoke on behalf of the EOUST. He said that the EOUST was appreciative of the subcommittee's efforts. But he thought the subcommittee's form was still too complex and full of legalize for the typical unsecured creditor. In particular, the EOUST is sensitive to creditor complaints that participation in chapter 11 cases is prohibitively expensive, especially in small cases, because hiring counsel to interpret the documents filed in the case usually costs more than any potential recovery. Accordingly, Mr. Walton advocated a simpler form as being much more likely to encourage creditor involvement in small cases.

Mr. Walton also took issue with one of the Business Subcommittee's suggested purposes of the form disclosure statement. He believed it was unlikely that a court would rely on a disclosure statement to determine whether a plan was confirmable or not. In closing, Mr. Walton recommended that the subcommittee's proposed disclosure statement be rejected, and that instead the subcommittee be reconvened to consider a simpler "Plain English" form disclosure statement based on the draft submitted by the EOUST at Agenda Item 6(c)(2).

Judge Swain responded that although the Business Subcommittee only recently received the EOUST's draft disclosure statement, it *had* considered the document. Moreover, she noted, early in the process the subcommittee considered and rejected a similar document advocated by the EOUST as misleading or inaccurate.

Mr. Brunstad said that he preferred the form disclosure statement prepared by the Business Subcommittee because it provided more information. And Judge Walker said he thought the subcommittee's effort was probably the "lowest level" version of a disclosure statement likely to be useful, even if it wasn't drafted in terms preferable to some creditors. Judge Klein supported use of the subcommittee's form because it tells the creditor up front how much and when it is likely to receive a distribution, and because the form would also be useful in guiding unsophisticated debtor's lawyers through a chapter 11 confirmation.

The Chairman suggested the Committee go through the subcommittee's proposed disclosure statement and then vote on whether or not to recommend it. Mr. Janger told the

Committee that if the form were adopted that he would amend it to include a table of contents, and to conform the caption to the changes that the Committee already approved for the form plan. Members of the Committee suggested some stylistic changes and the following additional changes:

- A new subsection II-G entitled "Claims Objections" stating that "Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. The procedures for resolving disputed claims are set forth in Article __ of the Plan."
- Mr. Shaffer suggested changing existing exhibit D to require the most recently filed operating report (instead of all operating reports) and suggested deleting existing exhibit C, (tax returns).

The Committee voted without dissent to approve the changes noted above and to recommend the Business Subcommittee's form disclosure statement for publication for public comment.

Possible Combined Form Plan and Disclosure Statement, *Agenda Item 6(c)(3)*: The Business Subcommittee reported that it has not attempted to draft a proposed combined plan and disclosure statement for use in small business cases. The Chairman moved to table the project for a year so that the subcommittee would have the benefit of comments on the form plan and form disclosure statement that the Committee just recommended for publication. Judge Swain seconded the motion. **The Committee voted without dissent to table the decision of whether the Business Subcommittee should draft and propose a combined form plan and disclosure statement until the spring 2007 meeting of the Committee.**

Rule 2015.3, Form 26, *Agenda Item 6(c)(5)*: Professor Janger explained that the Business Subcommittee proposed a new Rule 2015.3 and a new Official Form 26 to address a new requirement imposed by § 419 of BAPCPA that the debtor make periodic reports of valuation, profitability and operations concerning entities in which it has a substantial or controlling interest. An initial problem faced by the subcommittee was that the term "substantial or controlling interest" is not defined in the Code, but rather is a factual determination that the court ultimately must decide. However, the subcommittee believed that some guidance was needed so that parties would know when to fill out the form. The subcommittee elected to set a presumption that 20% control or ownership is a substantial or controlling interest.

Another issue, explained Professor Janger, is that the statutory reporting requirement appears to address only debtors, not the estate, debtors in possession, or trustees. The subcommittee elected to require reporting from the debtor in possession and any trustee because it thought such entities would more likely be able to fulfill the reporting requirements. **After making a number of stylistic changes, the Committee voted to recommend Form 26, Rule 2015.3, and the accompanying Committee Note be published for public comment.**

Means-Test Forms

Agenda Item 7(a) (Means-Test Form Review): Judge Wedoff reported on the recommendations of the Means-Test Working Group with respect to changes in two of the means-test forms (Forms 22A and 22C). The working group, consisting of Judge Wedoff, Judge Frank, and Mr. Redmiles, discussed in detail the suggestions and comments received from the NBC, the Financial Services Roundtable (FSR), and others, as well as suggestions developed internally. Many of the suggestions had already been considered and rejected by the Committee when it recommended the means-test forms in the summer of 2005. The changes recommended by working group and the NBC's February 17, 2006, comments were included at Agenda Item 7(a). The FSR comments were distributed at the meeting.

The working group suggested a number of stylistic changes in the means-test forms to improve clarity. And it recommended other changes (in the "Other Necessary Expenses" categories for child care and telecommunications, and the "Other payments on secured claims" category, for example) to more closely track the statutory language and IRS definitions. The working group also reworded the instructions at line 17 of Form 22C (Chapter 13) so that the debtor would always be directed to complete part III of the form, regardless of whether the debtor was above or below the state median. The changes recommended by the working group were incorporated into the forms included as Agenda Item 7(a). In reviewing the changes, the Committee removed the words "in Default" in the middle column of the table in the "Other secured claims" box (line 43 on Form 22A, and line 48 on Form 22C). **The Committee voted to recommend adopting all the changes proposed by the working group as set out in Forms 22A and 22C at Agenda Item 7(a) (as amended) and also recommended that the changes become effective October 1, 2006.**

The working group considered but rejected the following suggestions:

(1) A suggestion by the NBC that the chapter 13 form be revised to allow a deduction of income used to pay the debtor's household expenses but not actually received by the debtor (such has payment by a grandparent of a child's school tuition) from the calculation of disposable income. *The working group recommended no change.*

(2) A suggestion by the NBC to allow inclusion of expenses in an "Other Necessary Expenses" box even if such expenses do not fit into the IRS Other Necessary Expense categories listed on the form. *The working group recommended no change, as provisions for listing "Additional Expense Claims" already exist at the end of the means-test forms.*

(3) A suggestion by the NBC that non-filing spousal income not be counted in the calculation of the § 707(b)(7) safe harbor, if it can be shown that the non-filing spouse's income is not being contributed to the debtor's household income. *The working group noted that this suggestion was considered and rejected by the Committee at its last meeting.*

(4) The FSR suggested that the projected chapter 13 expenses multiplier in the chapter 7 and 13 forms indicate a cap of 10%. *The working group recommended no changes because the form currently directs the debtor to use the actual multiplier as reported by the United States trustee, and no multiplier is greater than 10%.*

(5) The FSR suggested removing language in the forms that allows the debtor to argue unemployment income is "a benefit received under the Social Security Act" and that it should therefore be excluded from the CMI calculation. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(6) The FSR suggested that the chapter 7 form be changed to require that below-median-income filers complete the expense portion of the form even though such filers are not subject to a presumption of abuse. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(7) The FSR suggested changing the forms to allow an automobile ownership deduction only if the debtor is actually making lease or note payments on an owned vehicle. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(8) The FSR suggested deleting line 13 from the chapter 13 form (which allows the debtor to contend that a non-filing spouse's income was not contributed to household expenses). *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(9) The FSR suggested deleting the "Additional Expense Claims" categories at the end of the chapter 7 and 13 forms. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

Forms (Other than Means-Test Forms and Small Business Forms)

The Chairman advised the Committee that the EOUST has strongly requested that the rules require the use of data-enabled forms and that the Administrative Office produce data-enabled forms. The Chairman referred the matter to the Subcommittee on Technology and Cross Border Insolvency for consideration.

Mr. Ketchum reported to the Committee on the work of the Forms Subcommittee.

Agenda Item 9(b), Form 10: Ms. Ketchum reminded the Committee that it already approved the changes proposed for Form 10 when it discussed proposed amendments to Rule 3001 earlier in the meeting. She noted, however, that there had been some discussion about whether to replace the word "copies" in box 7 with the word "duplicates." **The Committee voted without dissent to approve use of the word "copies."**

Agenda Item 9(c)(1): Ms. Ketchum described the need to conform the forms to incorporate the requirement that if a "minor child" is listed, that the name, address, and legal relationship of any person described in Rule 1007(m) also be included. Ms. Ketchum explained that the conforming language was needed in Forms 4, 6B, 6G, 6H and 7. **The Committee approved all of the "minor child" conforming language changes made to Forms 4, 6B, 6G, and 6H, and recommended the changes be published for public comment.**

Ms. Ketchum said there had been a minor change to the declaration page for Form 6 to indicate that an additional page was being filed. She proposed changing the direction to report the total number of pages listed on the summary of schedules page from "plus 1" to "plus 2." Judge Frank asked whether it was possible to remove the "plus" language altogether. **After a discussion, the Committee approved the "plus 2 change" and recommended that the change become effective on October 1, 2006.**

Ms. Ketchum described an additional change to Form 7 at question 3. The new language directs the debtor not to list creditor payments that aggregate less than $600. **The Committee approved the change, and voted to recommend the change be published for public comment.**

Ms. Ketchum described suggested changes to Form 6B (questions 13, 14, and 21) which referenced new Rule 2015.3. The Committee alternatively discussed changing or deleting the proposed language. **After discussion, the Committee voted to delete the suggested changes to questions 13, 14, and 21 of Form 6B.**

Ms. Ketchum described changes to Forms 9G, 9H, and 9I. Forms 9G and 9H had been changed to include "Family Fisherman" and Form 9I was amended to include a reference to Rule 3002(c)(1) at the deadline for a governmental unit to file a proof of claim. **The Committee approved the changes to 9G, 9H, and 9I and voted to recommend they go into effect October 1, 2006.**

Agenda Item 9(c)(2): Ms. Ketchum reviewed several changes to the forms that were needed to capture statistical information required by BAPCPA and noted that if approved, such changes should go into effect October 1, 2006.

Form 1. A number of changes were made. Ms. Ketchum noted new language requiring debtors to identify themselves as "tax exempt" rather than "nonprofit" in the middle box, and new language added to the "Chapter 11 Debtors" box. A committee member suggested the introductory language in the middle box to "Check one box," and members discussed changing the choice between "Consumer/Non-Business" and "Business" to "Debts are primarily consumer debts (personal family household debt)" and "Debts are primarily business debts" so that the distinction more closely follows language used in the Code.

Ms. Ketchum noted that there was newly proposed language on the third page of Form 1 whereby individual debtors certified they had completed the credit counseling requirement. But the Committee decided the new language was not necessary in light of its prior decision to create a new official form (eventually designated as Exhibit D to the petition) which would require a similar certification and would warn the debtor that the failure to complete credit counseling prepetition would result in dismissal of the case unless an exception applied.

Form 5. Ms. Ketchum reviewed suggested changes made to conform Form 5 to Form 1. Committee members suggested additional conforming changes.

Form 6. Ms. Ketchum described the addition of boxes needed to collect statistical information at Form 6-Summary, 6D, 6E, 6F, 6I, and 6J. And she noted that Form 6-Summary was redesigned to collect additional statistical information. The Committee suggested a number of stylistic changes.

The Committee approved the suggested changes to Forms 1, 5, 6-Summary, 6D, 6E, 6F, 6I, and 6J, and asked Ms. Ketchum to incorporate the changes into final versions for review by the Forms Subcommittee. The Committee voted to recommend that the changes go into effect October 1, 2006.

The Chairman recapped the recommended changes to the forms. **To be published for public comment: Forms 3A, 3B, 4, 6B, 6G, 6H, 7, 10, 24, 25A, 25B, 25C, and 26. To be published for public comment *and* to go into effect in October 1, 2006: Forms 1, 5, 6-Summary, 6D, 6E, 6F, 6I, 6J, 6-Declaration, 9G, 9H, 9I, 22A, 22C, and 23. In addition, all other forms amended in October 2005 are to be published for comment.**

Additional Action Items

Rule 1005, *Agenda Item 9(d)*: The Reporter said that although the Committee had already updated the forms to incorporate the BAPCPA changes that increased the time between chapter 7 discharges from six to eight years, a conforming change was also required for Rule 1005. **The Committee voted to recommend the conforming change to Rule 1005 to be published for public comment.**

Rule 1015, *Agenda Item 4(g)*: The Reporter recommended a technical change to Rule 1015(b) to update references in the rule in accordance with nomenclature changes made by BAPCPA to section 522 of the Code. **The Committee approved the technical changes to Rule 1015(b) without objection.**

Agenda Item 10: The Reporter discussed the Standing Committee's appointment of an Ad Hoc Committee to consider the propriety of introducing new time computational rules for adoption by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He noted that this was a multi-step process and that the Ad Hoc Committee's first task was to identify the time computational rules among each set of rules, and to propose amendments to harmonize counting days under each set of rules. He referred the Committee to Judge Kravitz's January 20, 2006, memo which included a template for the time computational rules, including Bankruptcy Rule 9006. The Reporter also prepared a revised Rule 9006 that incorporated the Ad Hoc Committee's suggestions. **The Committee approved Judge Kravitz's memo as a template for reviewing and recommending changes to Rule 9006. The Chairman asked the Reporter to study further the changes and to prepare a list of all bankruptcy rules with time periods.**

Agenda Item (6)(a): The Reporter addressed an issue that had arisen in partial response to In re State Line Motel, Inc., 322 B.R. 123 (9th Cir. BAP 2005), which held that service of an objection to claim is sufficient if it is mailed or otherwise delivered to a claimant under Rule

3007. The court rejected the argument made by many that service should be in the manner of a complaint as set out in Rule 7004. The Reporter said that the State Line at least raises the issue of whether the rules should be amended to clarify the service requirements for a proof of claim. However, the Reporter recommended no amendments to the rules at this time. He noted that two bankruptcy opinions had been published since State Line came out, and both accepted the State Line reasoning. He argued that the consistent court decisions on this issue suggest that it is premature for the Rules Committee to take any action. **After discussing the Reporter's recommendation, the Committee voted to make no changes to the rules with respect to proper service of an objection to a proof of claim.**

Agenda Item 7(d): The Reporter discussed a proposed amendment to Rule 1007 that would required a chapter 13 debtor to provide annual income updates, but recommended no action at this time. **The Committee took no action.**

Agenda Item 8(a): Judge Adam's proposal to amend the separate document provisions of Rule 9021 – Santa Fe Agenda Item 10(a). **The Chairman deferred the subcommittee report until the next meeting.**

Agenda Item 8(b): Judge Klein reviewed a proposed change suggested by Judge Rasure to Rule 3002(c)(5) to require that a proof of claim be filed by a date certain in a case with newly discovered assets so that the trustee and the court can more easily identify untimely claims. **The Committee approved the proposed change to Rule 3002(c)(5) to be published for public comment.**

Information and Discussion Matters

Agenda Item 11, Report concerning the restyling of the Civil Rules; impact on bankruptcy rules: The Chairman referred the Committee to the Reporter's memo at Agenda Item 11.

Agenda Item 12, E-Government Rule – Rule 9037: The Chairman noted that the Committee considered and made changes to 9037 earlier in the meeting.

Agenda Item 13, Report of Joint Subcommittee on Venue and Chapter 11 Matters: The Chairman noted that the Joint Subcommittee previously made its report in the context of its review of the comments to Rules 1014, 3007, 4001 and 6006 and new Rule 6003.

Agenda Item 14, Revision of Director's Procedural Forms 240, Reaffirmation Agreement, and 281, Appearance of Child Support Creditor or Representative: **The Chairman asked the Forms Subcommittee to review proposed changes presented by Ms. Ketchum to Director's Forms 240 and 281.**

Agenda Item 15, Discussion on electronic transmission of agenda materials: **No action.**

Agenda Item 16, Discussion of place and time for the spring 2007 meeting: The Chairman asked members to e-mail suggestions.

Administrative Matters

The Chairman recognized the excellent work of Howard Adelman, Judge Eric Frank, Professor Alan Resnick, and Judge Ernest Torres, and thanked them for their contributions to the Committee over the years. To commemorate their contributions, the Chairman presented each individual present with a certificate signed by the Director of the Administrative Office, Ralph Leonidas Mecham, and by Chief Justice John G. Roberts, Jr. As an additional token of appreciation, the Committee also presented Professor Resnick with a bowl engraved with the name of each committee chairman who served while Professor Resnick was the reporter or a committee member.

Respectfully submitted,

Stephen Scott Myers

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 22-23, 2006
Volume III

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 22-23, 2006

VOLUME I

1. Opening Remarks of the Chair

   A. Report on the March 2006 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2006 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center (Oral report)

5. Report of the Technology Subcommittee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed uniform rules' amendments governing privacy and security concerns arising from electronic filings with the court in accordance with the E-Government Act of 2002
   B. Text of amendments to Appellate, Bankruptcy, Civil, and Criminal Rules implementing E-Government Act

6. Report of the Appellate Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rule 25(a)(5) implementing E-Government Act
   B. Minutes and other informational items

7. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 29 and 41
   C. Minutes and other informational items

8. Report of the Evidence Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed new Rule 502
   B. Minutes and other informational items

9. Time-Computation Subcommittee Report

10. Long-Range Planning Report

VOLUME II

11. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1014, 3007, 4001, 6006, and 7007.1, and proposed new Rules 6003, 9005.1, and 9037
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009, and proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, 5012, and 6011
   C. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Interim Rule 1007
   D. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Official Forms 1, 5, 6, 9, 22A, 22C, and 23, and new Exhibit D to Official Form 1
   E. **ACTION** – Approving publishing for public comment proposed amendments to Official Forms 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, 24, new Exhibit D to Official Forms 1, 25A, 25B, and 26
   F. Minutes and other informational items

VOLUME III

12. Report of the Civil Rules Committee

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed new Rule 5.2
   B. **ACTION** — Approving and transmitting to the Judicial Conference proposed restyled Rules 1-86
   C. **ACTION** — Approving and transmitting to the Judicial Conference proposed style/substance amendments to Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78

D. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes of Civil Forms

E. **ACTION** — Approving and transmitting to the Judicial Conference proposed changes to the electronic discovery amendments involving Rules 16, 26, 33, 34, 37, and 45

F. **ACTION** – Approving publishing for public comment proposed amendments to Rules 6, 13, 15, and 48, and proposed new Rule 62.1

G. Minutes and other informational items

13. Next Meeting: January

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
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CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **June 2, 2006**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on May 22-23, 2006. Draft minutes of the meeting are attached.

Part I of this report presents action items. Subpart A recommends approval for adoption of two sets of proposals. The first is Civil Rule 5.2, the Civil Rules version of the E-Government Rules developed under direction by the Standing Committee Subcommittee on the E-Government Act. The second is the package of Style amendments — Style Rules 1-86; Style-Substance amendments to Rules 4(k), 9(h), 11(a),14(b),16(c)(1), 26(g)(1), 30(b), 31; 40, 71.1, and 78; Style Forms; and the Style versions of the amended rules on electronic discovery now pending in Congress and scheduled to take effect on December 1, 2006 (Rules 16, 26, 33, 34, 37, and 45).

Subpart I B recommends approval for publication of new Rule 62.1 on indicative rulings and amendments to Rules 13(f), 15(a)(amended pleadings), and 48 (jury polling). The recommendation is to publish these proposals — along with the modest amendment of Rule 8(c) approved for publication at the January meeting — at a later date, presumably August, 2007, when they can be included in a package with other proposals.

Part II of this report presents information items describing the projects that are being developed for further consideration.

12-A

I. Action Items

A. RULES RECOMMENDED FOR ADOPTION

1. Rule 5.2

The Committee recommends approval for adoption of new Rule 5.2:

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5.2. Privacy Protection For Filings Made with the Court

(a)Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference

policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed

rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv)of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

FEDERAL RULES OF CIVIL PROCEDURE

Rule as Published

The changes made from Rule 5.2 as published are shown by overstriking and underlining.

Rule 5.2. Privacy Protection For Filings Made with the Court

1 **(a) Redacted Filings.** Unless the court orders otherwise, in
2 an electronic or paper ~~made~~ filing with the court that ~~includes~~
3 contains an individual's social-security number, ~~or an~~
4 ~~individual's~~ taxpayer-identification number, or birth date, the
5 ~~a~~ name of an individual ~~person~~ known to be a minor, or a
6 financial-account number, a party or nonparty making the
7 filing may include only:
8 **(1)** the last four digits of the social-security number and
9 taxpayer-identification number;
10 **(2)** the ~~minor's initials~~ year of the individual's birth;
11 **(3)** the minor's initials ~~the year of birth~~; and
12 **(4)** the last four digits of the financial-account number.

13 **(b) Exemptions from the Redaction Requirement.** The
14 redaction requirement ~~of Rule 5.2(a)~~ does not apply to the
15 following:

16 **(1)** ~~in a forfeiture proceeding,~~ a financial-account
17 number that identifies the property allegedly ~~to be~~ subject
18 to forfeiture in a forfeiture proceeding;

19 **(2)** the record of an administrative or agency
20 proceeding;

21 **(3)** the official record of a state-court proceeding;

22 **(4)** the record of a court or tribunal ~~whose decision is~~
23 ~~being reviewed~~, if that record was not subject to ~~Rule~~
24 ~~5.2(a)~~ the redaction requirement when originally filed;

25 **(5)** a filing covered by Rule 5.2(c) or (d); and

26 **(6)** a pro se filing ~~made~~ in an action brought under 28
27 U.S.C. §§ 2241, 2254, or 2255.

28 **(c) Limitations on Remote Access to Electronic Files;**
29 **Social-Security Appeals and Immigration Cases.** Unless
30 the court orders otherwise, in an action for benefits under the
31 Social Security Act, and in an action or proceeding relating to
32 an order of removal, relief from removal, or immigration

33 benefits or detention, access to an electronic file is authorized
34 as follows:
35 **(1)** the parties and their attorneys may have remote
36 electronic access to any part of the case file, including the
37 administrative record;
38 **(2)** any other person may have electronic access to the
39 full record at the courthouse, but may have remote
40 electronic access only to:
41 **(A)** the docket maintained by the court; and
42 **(B)** an opinion, order, judgment, or other
43 disposition of the court, but not any other part of the
44 case file or the administrative record.
45 **(d) Filings Made Under Seal.** The court may order that a
46 filing be made under seal without redaction. The court may
47 later unseal the filing or order the person who made the filing
48 to file a redacted version for the public record.
49 **(e) Protective Orders.** ~~If necessary to protect private or~~
50 ~~sensitive information that is not otherwise protected under~~
51 ~~Rule 5.2(a), a~~ For good cause, the court may by order in a
52 case:

53 **(1)** require redaction of additional information; or

54 **(2)** limit or prohibit a nonparty's remote electronic

55 access ~~by a nonparty~~ to a document filed with the court.

56 **(f) Option for Additional Unredacted Filing Under Seal.**

57 A ~~party~~ person making a redacted filing ~~under Rule 5.2(a)~~

58 may also file an unredacted copy under seal. The court must

59 retain the unredacted copy as part of the record.

60 **(g) Option for Filing a Reference List.** A filing that

61 contains redacted information ~~redacted under Rule 5.2(a)~~ may

62 be filed together with a reference list that identifies each item

63 of redacted information and specifies an appropriate identifier

64 that uniquely corresponds to each item ~~of redacted~~

65 ~~information~~ listed. The ~~reference~~ list must be filed under seal

66 and may be amended as of right. Any reference in the case to

67 ~~an~~ listed identifier ~~in the reference list~~ will be construed to

68 refer to the corresponding item of information.

69 **(h) Waiver of Protection of Identifiers.** A ~~party~~ person

70 waives the protection of Rule 5.2(a) as to the ~~party's~~ person's

71 own information ~~to the extent that the party files such~~

72 ~~information~~ by filing it without redaction and not under seal

73 ~~and without redaction~~.

Committee Note

The Committee Note was amended only in the paragraph discussing subdivision (e): * * *

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule~~, where necessary to protect against disclosure to non-parties of sensitive or private information~~. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Changes Made After Publication and Comment

The changes made after publication were made in conjunction with the E-Government Act Subcommittee and the other Advisory Committees.

As published, subdivision (b)(6) exempted from redaction all filings in habeas corpus proceedings under 28 U.S.C. §§ 2241, 2254, or 2255. The exemption is revised to apply only to pro se filings. A petitioner represented by counsel, and respondents represented by counsel, must redact under Rule 5.2(a).

Subdivision (e) was published with a standard for protective orders, referring to a need to protect private or sensitive information not otherwise protected by Rule 5.2(a). This standard has been replaced by a general reference to "good cause."

Discussion

Rule 5.2 was developed under the direction of the Standing Committee Subcommittee on the E-Government Act and in conjunction with the development of parallel rules by the Appellate, Bankruptcy, and Criminal Rules Committees. Many of the choices reflected in the rule are dictated by the Act. The basic approach is further framed by policies recommended by the Committee on Court Administration and Case Management and adopted by the Judicial Conference. The policy

is that in most circumstances everyone in the world should have direct access by electronic means to electronically maintained court records under the same rules that apply to in-person access to paper files at the courthouse.

Further discussion is provided by the Report of the E-Government Act Committee.

Summary of Comments

Jack E. Horsley, Esq., 05-CV-006: Suggests adding a new paragraph (5) to Rule 5.2(a) to require redaction of "the employee number if the person is a state or federal employee." [This could be made parallel to other identification numbers by adding "the last four digits of the employee number"; that formulation might suggest including this element as part of paragraph (1).]

Federal Magistrate Judges Assn., 05-CV-024: Supports the published draft, but urges incorporation in rule text of two sentences from the Committee Note: "The responsibility to redact filings rests with counsel and the parties. The clerk is not required to review each filing for compliance with this rule." Experience shows that if this warning is buried in the Committee Note "an expectation may arise that the court, through the clerk, will review documents for compliance with this rule."

Judicial Conference Committee on Court Administration and Case Management, 05-CV-025: **(1)** Rule 5.2(b)(4) should be amended to exempt from redaction: "the record of a court or tribunal whose decision ~~is being reviewed~~ becomes part of the record * * *." The discussion focuses on the parallel language in the Bankruptcy Rule. A Bankruptcy Court does not "review" any other court, but frequently has occasion to consider a record of proceedings in another court. The same thing is true of district courts. **(2)** Supports the limit on public remote electronic access "to the bulk of documents in immigration cases." But the Rule 5.2(c) limit on remote public access to records in immigration proceedings should be relaxed to permit "all other persons" to have remote electronic access to "the initiating documents (e.g., opinions issued by the Bureau of Immigration Appeals and Immigration Judges) * * *." The party filing the appeal from the prior decision should be required to redact the initiating document. (Under 5.2(b)(4) these things are not redacted. The comment does not reveal whether the general public has remote electronic access to the originals.)

David J. Piell, Esq., 05-CV-026: Simply deleting the first five digits of social-security and tax-identification numbers provides little protection; most large organizations use the last four digits to identify individuals, and many public records data warehousers provide the first five digits in their reports. (The idea seems to be that a court filing that identifies a person by name and also provides the last four digits leads down an easy path to getting the first five digits.) The answer is to enhance the CM/ECF system to generate an automatic reference list. Each case file would have a protected page that sets out each protected item and assigns it a reference number. Only attorneys of record and the judge assigned to the case would have access to the protected page, and the system would identify each person who had access to enable identification of anyone who misuses the information.

Peter A. Winn, Esq., 05-CV-027: This long comment is made by an Assistant United States Attorney who teaches privacy law and has written on access to online court records, 79 Wash.L.Rev. 307 (2004). There is high praise for the proposed rules as implementing the E-Government Act's mandate in light of the capabilities of the PACER system. The PACER system "was not designed with the competing goals of facilitating access and protecting privacy in mind. * * * [I]t contains very few privacy enhancing technologies — e.g., software programs which can automatically identify and flag sensitive information such as social security numbers, or programs which permit the easy and effective redaction of sensitive information in pleadings." "To make up for the lack of privacy enhancing technologies, the proposed rules make attorneys the front line in the protection of sensitive information in judicial filings. * * * Unfortunately, while attorneys may be in a good position to decide what information of their clients is in need of protection, they may not be quite

as attuned to the need to protect the sensitive personal information of others * * *. [G]iven the PACER technology, there appears to be little choice in the matter."

It is important that the rule recognizes the opportunity to redact information in addition to that listed. Examples include not only driver's license and alien registration numbers, but such matters as individual health identification numbers and physician identification numbers.

There are good reasons to attempt to create an intermediate form of "online" access to court records in some circumstances, such as the social-security and immigration cases identified in Rule 5.2(c). Administrative appeals in Medicare claims and personal injury actions with large amounts of health records also are suitable for this treatment. But it is misguided to provide for full electronic access "at the courthouse" as Rule 5.2(c) would do. This "merely imposes a system of 'contrived inconvenience.' The proposed rule does not protect sensitive information in court records from a 'cottage' industry of copyists, who travel from courthouse to courthouse, selling the information from court files to third parties without restriction — a cottage industry that already appears to be thriving. The 'at the courthouse' rule also discriminates against people who may reside farther away from the courthouse * * *." There is a much simpler way to create an intermediate level of access. Existing PACER technology would support a rule that allows remote electronic access by any interested member of the public "upon request, after notice to the parties." PACER can automatically send notice to the parties. There would be a protected interval during which any party could object. If no party objects, full remote access would be allowed. If a party objects, the matter could be briefed and decided. As compared to access at the courthouse without notice, the parties would know the identity of anyone requesting access, and could respond accordingly — requests from researchers, for example, might not be opposed, while a request from a potential stalker would be.

This change could be accomplished by rewriting Rule 5.2(c) to authorize access to an electronic file: "all other persons may have electronic access to the full record ~~at the courthouse~~ as ordered by the court or as provided by local rule, ~~but~~ and also may have remote electronic access ~~only~~ to: * * *."

National Court Reporters Assn., 05-CV-028: This comment "seeks to ensure that members of the court family will not be adversely affected by these new requirements to redact information." The Committee Note statement that the responsibility for redaction rests on counsel and the parties should be expanded and incorporated in rule language:

> (b) *Responsibility for Redacted Filings.* The responsibility for identifying the personal information to be redacted in filings made with the courts rests solely with counsel and the parties. Clerks are not required to review documents filed with the courts for compliance with this rule. Nothing in this rule is intended to create a private right of action against court reporters or transcribers for any failure to redact the required information or for any errors associated with such redaction.

Public Citizen Litigation Group, 05-CV-029: This extensive comment is difficult to summarize briefly. This attempt is designed to help recall the major points, not all of the supporting arguments.

Subdivision (c). The central suggestion at the end is that remote nonparty access should be permitted as to all but the administrative record in social security cases; there is some ambiguity, but the suggestion may be that even the administrative record should be available for remote nonparty access in immigration cases.

At the end of the comment another suggestion is made. Rule 5.2(c) should not apply to "filings in the court of appeals." Apparently this means materials created for the court of appeals, not things filed in the district court. These materials, even the appendix, are less likely to contain private

information, and public access is critical to support public understanding of the appellate disposition. At a minimum, appellate briefs and potentially dispositive motions should be available to the world by remote electronic access.

Beginning with social security cases, it is recognized that the administrative files generally are kept confidential at the agency level. Continued restriction on electronic access after filing in court is appropriate, and will not change present practice under Judicial Conference policy on public access to electronic case files. Redaction in other court papers — or a case-specific limit on remote nonparty access — can be accomplished by court order for information not already subject to subdivision (a); requiring a court order protects the public and enables parties to protect against identity theft and invasions of privacy "in cases that truly raise such concerns."

Immigration cases are different. Current policy provides no limit on remote nonparty access. The files "often do not involve the detailed financial and health documentation that is regularly part of the agency record in Social Security cases. Particular cases, of course, might warrant greater protection." Barring access "would shield problems at the agency level from the public eye * * *. Courts have recognized serious problems in the agency adjudication of immigration cases * * *." Remote public access will serve interests of reporters based in distant cities, of academics conducting research, and lawyers and pro se litigants who use filings in other cases as models in their own. Access to the filings, further, is often necessary to understand the court disposition that is available for nonparty remote access.

The broad reach of subdivision (c) as proposed cannot be justified by the volume of filings. The rule contemplates public electronic access at the courthouse; availability over the internet will not impose significant added burdens. The government would have to redact subdivision (a) information from its filings, but the burden would not be great in light of subdivision (b)'s exemption of administrative records from redaction.

It is pointed out that proposed Rule 5.2(b)(5) exempts from redaction all filings covered by 5.2(c) — the result is that the private information in social security and immigration proceedings would be fully available from paper files and electronic access at the courthouse. Apart from the direct irony, the result would be that data brokers have an added incentive to retrieve the information at the courthouse — the resale price will increase because of the disadvantage of individual inquiry at the courthouse.

Finally, the provision in subdivision (c)(2) that the public may have electronic access to the full record at the courthouse may imply that there is no public access to the paper record. This would bar all public access to information that is held only in paper form.

Subdivision (d). This subdivision "appears to grant the courts a general authority to seal any filing for any reason." That is contrary to the carefully developed rules that govern sealing practice. The Committee Note disclaiming this result "does not have the force of law, * * * and the text of the rule itself appears to suggest the opposite." Subdivision (d) "is unnecessary and should be stricken." If not stricken, it should open: "When authorized by law * * *."

Subdivision (e). In general, "We support proposed subdivision (e), which authorizes the court to issue protective orders requiring redaction of additional information or to limit remote electronic access to filings." But it goes too far to protect "sensitive" information. Public access should be restricted only to protect a legitimate trade secret, a recognized privilege, or matter required by statute to be maintained in confidence. The rule also "should specify that the court is required to consider the public interest prior to restricting access to filings." Rule 5.2(e) should be revised:

If necessary to protect private ~~or sensitive~~ information that is not otherwise protected under Rule 5.2(a), and only where the interest in privacy outweighs the public interest in openness, a ~~the~~ court may by order in a case limit or prohibit * * * ."

Electronic Privacy Information Center, 05-CV-030: "Instead of being citizens' window into government activities, public records are giving the government, law enforcement, and data brokers a window into our daily lives." Data companies are seeking legislative exemptions that would free them from consumer protections so long as the information they sell is in a public record; they "are banking on the courts to pour information into the public record so that it can be sold without privacy safeguards." **(1)** Courts first should minimize the private information they collect. **(2)** Paper records must be protected in addition to electronic records; Rule 5.2(c) should be revised to prevent data aggregators from gathering electronic records at the courthouse or scanning paper records. Indeed, commercial data brokers employ hundreds of stringers who hand-copy sensitive personal information. **(3)** The Committee should consider adopting limits on the uses that can be made of information obtained from court records. **(4)** "Unique identifiers" should be reduced beyond the redactions required by 5.2(a). Different institutions follow different redaction policies. Some, for example, delete the last four digits of social security numbers; data from such a source can be combined with the last four digits in a court record to reconstruct the full number. Home addresses, telephone numbers, and mother's maiden names also should be redacted; the credit industry is using these numbers to authenticate individuals for new accounts, creating a risk of identity theft. **(5)** The PACER system should limit bulk downloads.

United States Department of Justice, 05-CV-031: The Committee should continue to monitor implementation of Rule 5.2 for several reasons. Subsections (d) through (g) provide flexibility to protect information not specifically addressed; it will be important to determine whether this is the most effective means of protecting such information as medical records or confidential business plans. Additional exemptions may be needed for money laundering cases that require that proceeds be traced through a complex chain of transactions.

Trial exhibits not filed in the district court present a problem: Rule 5.2(b)(4) could be read to mean that because the unfiled exhibit was not subject to redaction in the district court, it is not subject to redaction when included in an appellate appendix. But the Committee Note states redaction is required. "The Rule should be made clear as to the treatment of such materials. Further, differing redaction requirements at two levels of court review have the potential to cause confusion and mistake." At the least, continuing monitoring is required.

The language of Rule 5.2(b)(1) should be rearranged: "~~in a forfeiture proceeding,~~ a financial account number that identifies the property alleged to be subject to forfeiture in a forfeiture proceeding." This will clarify that redaction is not required when issues relating to property subject to forfeiture arise "in related cases that may implicate the identified assets. In addition, the changes would clarify that the exemptions apply to forfeiture seizure warrant applications and warrants, which often are used to take forfeitable property into custody before the commencement of any 'forfeiture proceeding.'"

Reporters Committee for Freedom of the Press, 05-CV-032: "Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic needs." (Examples are given of major stories based on computer analysis of massive volumes of court records — 800,000 criminal cases were examined for an article that found, for example, that white defendants had a 50% better chance than blacks to receive a plea agreement that erases felony convictions from their records; 3,000,000 state and federal computer records, including court records, were analyzed to show that more than 1,700 people had been killed accidentally due to mistakes by nurses burdened by cost-cutting measures; and so on.) Remote access also improves accuracy.

Rule 5.2(a). Years of birth and minors' names should not be redacted. This information is used to correctly identify the subjects of news stories. In addition, there should be a provision recognizing that members of the public may move to unseal the unredacted version of a pleading; the standard should be stated — for example, that the public interest in access outweighs the asserted privacy interest.

Rule 5.2(c). Remote electronic access should be as extensive as that available at the courthouse. The purpose for seeking access does not matter. This best accommodates established First Amendment and common-law rights of access. The public's capacity to monitor the justice system is enhanced. The proposed rule seems to reflect the theory of "practical obscurity" that values the impediments to access that arise from time, cost, and distance. But this theory is inapposite. The practically obscure information will be gathered by private companies, used by businesses, and even compiled in commercial electronic databases. Any real need to protect truly sensitive information can be served by a protective order. Immigration cases illustrate the value of public access — analysis of electronic court records to monitor immigration decisions is particularly important because immigration courts rarely issue published opinions explaining their decisions. Social security appeals are a like example. New York and Maryland have liberal electronic access policies and "have not suffered any adverse results." "The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft."

Rule 5.2(d). This provision for sealed filings should specify the standards for sealing, "for example, by requiring specific findings on the record and giving the public an opportunity to be heard on the issue and by requiring a showing of good cause that the party would otherwise suffer an undue burden." There also should be a provision recognizing public standing to move to unseal or dissolve a protective order "when the public's interest in the information outweighs the asserted interest in privacy."

National Association of Criminal Defense Lawyers, 05-CV-033: The comment on Criminal Rule 49.1 is extended to Civil Rule 5.2(b)(6). There should not be an exemption from "the salutary operation of" the rule for habeas corpus or § 2255 proceedings. The argument that many petitioners proceed pro se and should not face redaction burdens is offset by the fact that many petitioners are represented. Conversely, some criminal defendants are not represented and must comply with redaction requirements. Instead of an exemption, there should be a statement that pro se petitioners are encouraged to abide by redaction requirements but are not required to do so.

Hon. William G. Young, 05-CV-034: Several observations:

(1) Residential street addresses "ought to be eliminated in all cases unless the presiding judge otherwise orders." To have different rules for civil and criminal cases will confuse court personnel and the bar. The criminal defendant addresses will appear in the inevitable post-conviction proceedings anyway (this observation seems to overlook the 5.2(b)(6) exemption). The fear of identity theft applies in both civil and criminal actions; do we want to admit, by distinguishing criminal actions, that they involve special fears of violence against witnesses and jurors?

(2) The Committee Note observation about trial exhibits has "the potential for a great deal of mischief." In D.Mass. trial exhibits "are never docketed and only the list of exhibits appear[s] in the district court records." To require redaction of exhibits that are in the custody of the deputy courtroom clerk and not available to the public would slow the trial and introduce confusion to jury deliberations. The lawyers will not want to do the redaction — but who else could? Above all, the Committee Note should not suggest that the public has some sort of entitlement to every trial exhibit. The Committee Note should be revised to say that trial exhibits should be redacted "whenever docketed as part of the court record."

(3) The Rule 5.2(f) option for additional unredacted filing under seal is mandated by a statute secured by the Department of Justice, but it "is a disaster for the courts." Litigants routinely seek confidentiality for things that should not be confidential, such as sealed settlement agreements. They can achieve confidentiality under the rule by including some scrap of redactable information in a filing and then "exercise the 'option' to make [the] entire filing under seal." (This comment reads the rule to mean that the redacted version placed in the public file can not only exclude the information that must be redacted but can also exclude anything the filing party regards as "confidential." The recommendation is that the rule should provide that the court "need not consult any unredacted paper document until there is on file in the court public electronic record a full counterpart document omitting only the data required to be redacted by civil rule 5.2(a) or criminal rule 49.1(a)." The recommendation reflects the intended operation of the rule: a party can redact information that Rule 5.2(a) does not require to be redacted only by obtaining a court order for additional redaction. A party can file under seal only by obtaining a court order — and Rule 5.2 does not expand the grounds for ordering a seal.)

Comments on Other E-Government Rules

05-CR-001, Bruce Berg: Mr. Berg is a consultant to the screening industry. He recommends that the Judicial Conference Policy should be changed to read: "Because the basic method for differentiating people with the same name is the Date of Birth and/or the SSN, the electronic record shall include these elements (at a minimum in the abbreviated form), and will be displayed in the electronic access (Pacer)."

05-CR-008 (also 05-BK-003, 05-AP-001), National Assn. of Professional Background Screeners: (This comment includes a submission by Shay D. Stautz, and the written form of testimony presented at a hearing before the Standing Committee by Mike Sankey): Background screening companies protect the interests of employers and applicants for employment, as well as landlords and prospective tenants, by searching for criminal records. Many people with the same or similar names are born in the same year. The full date of birth is needed to save extensive alternative inquiries into court records that will impose heavy burdens on court clerks. Criminal Rule 49.1(a)(3) should be revised to provide that the filing "may include only * * * (3) the year of birth for minors; and the day, month, and year of birth for adults * * *."

12-B

2. The Style Project

The Committee recommends that the Standing Committee approve for adoption each part of the Style Project. There are four parts: Rules 1-86; the minor, technical changes published on the separate Style-Substance track; the Civil Forms; and style revisions for the rules that were approved and are scheduled to become effective in December 2006, before the effective date of the Style Rules.

The Style Rules 1-86 were published in February 2005, along with the minor technical amendments of several rules. The Style Forms were published in August 2005. New Rule 5.1, the amendments of Civil Rule 50, and the e-discovery amendments now pending in Congress and scheduled to take effect on December 1, 2006, were published in August 2004, before the Style Rules were published. Although drafting conformed to Style Project conventions, these proposals amended the present rules and could not be fully integrated with the corresponding Style Rules. Any attempt to publish proposed Rule 5.1, Rule 50, and the e-discovery amendments in the full context of the Style Rules would have been both premature and confusing. The style revisions of Rules 5.1 and 50(b) are included in Style Rules 1-86. For clarity, the style revisions of the e-discovery amendments, Rules 16, 26, 33, 34, 37, and 45 are set out in a separate section.

These materials begin with a brief introduction that provides an overview of the Style Project and summarizes work since the public comment period ended. The materials then set out the proposed changes to Rules 1-86; the proposed minor, technical changes to Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78; the proposed changes to the Civil Forms; and the proposed changes to the electronic discovery amendments, Rules 16, 26, 33, 34, 37, and 45. A third section sets out the Rules as published and displays and discusses the changes recommended. A fourth section includes charts listing recurring "global" issues and renumbered subdivisions, revised to take into account the changes made since publication, and a memorandum addressing one area raised in the comment period. The final section summarizes the public comments.

Introduction

The Style Revision of the Civil Rules has accomplished its goal of clarifying and simplifying the rules, making them easier to use and understand, without changing substantive meaning. The amount of work, effort, and expertise required to achieve this goal is nothing short of remarkable. As this Committee knows well, each stage of the Style Project has presented many drafting choices and delicate drafting decisions. The cumulative results of those decisions are presented with a request that this Committee transmit the Style Rules to the Judicial Conference with a recommendation for approval. This introduction highlights certain aspects of the work on the Style Project since publication and summarizes the achievement it represents.

A. Rule 1 Note Language

The Committee recommends providing a summary of the drafting guidelines and principles used throughout the Style Project, to assist the bench and bar in using the amended rules and to underscore the intent to change only style, not substance. The most effective and convenient means to provide such a summary is in the Note to Rule 1. The Committee has approved Rule 1 Note language describing the general drafting guidelines and principles that apply to all the Style Rules, including formatting changes; removing inconsistent or inherently ambiguous words; minimizing the use of redundant "intensifiers" and cross-references; and removing outdated or redundant words. The Note language also explains that rule numbers remain unchanged and the reason for the few changes in some subdivisions. The Note also identifies the Style-Substance changes. The intent is to provide a readily accessible and brief guide to the changes made throughout the Style Project.

B. Addressing the Relationship to Other Laws

Public comment on the Style Project included an expression of concern that the style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 2072(b), provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern expressed is that although conflicts between the Civil Rules and other laws are admittedly rare, adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date. The theory is that priority in time between a Civil Rule and a conflicting law is measured by the date when a Style Rule "takes effect." For example, the provisions of the Private Securities Litigation Act that took effect in 1995 and superseded inconsistent provisions of the Civil Rules in effect before 1995 would in turn be superseded by the new effective date of the same Civil Rules on December 1, 2007.

The Advisory Committee believes that this concern lacks foundation. The Style Projects are not intended to affect supersession relationships. To the contrary, they are intended to carry forward the "substantive" meaning of the Rules without change. The Appellate Rules were restyled without any expression of concern on this score. The Criminal Rules were restyled without any expression of general concern. The Committee Note to Criminal Rule 48(b) recognizes that the pre-Style version had been followed by the Speedy Trial Act, which was inconsistent in important respects. The Note states that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." This approach confirms the conclusion that Enabling Act Rules can be restyled without affecting supersession relationships to other laws. Looking back to an earlier style project, no hint of supersession was raised when the Civil Rules were revised in 1987 to adopt gender-neutral language. After careful review, the Advisory Committee has concluded that similarly, the concern about supersession does not present a problem for the Civil Rules Style Project.

At the same time, just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Civil Rules and existing laws is unchanged. The Committee recommends a statement in Rule 86, which addresses the "effective dates" of rule amendments, to make explicit the relationship between the Style Amendments and existing statutes and to foreclose any supersession argument. The proposed Rule takes into account new Rule 5.2, which is also expected to take effect on December 1, 2007 and, unlike the Style Rules, takes effect on that date for the purpose of analyzing supersession effects. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. Proposed Rule 86(b) accommodates this by identifying the Style Rules taking effect on December 1, 2007.

A memorandum included in these agenda materials explains in greater detail why the concern about supersession does not present a problem for the Civil Rules Style Project and examines alternative ways to convey the intent to leave the relationship between the Rules and existing laws unchanged. Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

C. The Style Amendments to Rule Amendments Scheduled to take Effect on December 1, 2006

During the extended work on the Style Project, the Judicial Conference and the Supreme Court approved new Rule 5.1, amended Rule 50, and the proposed electronic discovery amendments. If Congress does nothing to disapprove them, these amendments will become effective on December 1, 2006. Although these proposals used many of the Style Project drafting guidelines and principles, to avoid confusion, they were published and approved as amendments to the existing rules. Minor revisions are required to make them fully consistent with the Style Project. The revisions have been approved by the Standing Committee Style Subcommittee and by the Advisory Committee. As noted, the style revisions to Rules 5.1 and 50 are included in Style Rules 1-86. For clarity, the revisions to Rules 16, 26, 33, 34, 37, and 45 are set out in a separate section of these agenda materials.

D. The Accomplishment of the Style Project

It is fitting that as we recommend the approval of the Style Amendments, we acknowledge the benefits of this work and thank those who inspired it, persisted in it, and accomplished it.

The Style Projects began in 1992 with Judge Robert E. Keeton and his vision of revising all the rules to make them clearer and easier to understand. Judge Keeton, with the late Professor Charles Alan Wright, persuaded the rules committees to undertake the work, although it is safe to say that they did not – and could not – appreciate the extent of the undertaking. Bryan A. Garner, a nationally recognized legal-writing scholar, prepared a first draft of the Civil Rules and also prepared drafting guidelines to serve as a common set of style preferences and conventions. Judge Sam C. Pointer, then chair of the Civil Rules Committee, refined that draft. The project was put aside for a time until Judge Anthony J. Scirica, then chair of the Standing Committee, and Judge David F. Levi, then chair of the Civil Rules Committee, resumed the work.

Judge J. Garvan Murtha was appointed chair of the Standing Committee's Style Subcommittee and Judge Thomas W. Thrash, Jr. and Dean Mary Kay Kane were appointed as members. They worked tirelessly to review and analyze the implications of every proposed Style change. Their work required countless meetings and conference calls and hundreds of drafts. This project could not have been completed without them.

Throughout the Style Project, the Civil Rules Advisory Committee has relied heavily on the expertise of three law professors with unparalleled knowledge of procedural law. The Committee's reporter, Professor Edward H. Cooper of the University of Michigan Law School, and the Committee's special reporters, Professor Richard L. Marcus of Hastings College of Law and Professor Thomas D. Rowe, Jr., of Duke Law School, analyzed every significant change in the rules, researched caselaw, and proposed drafting alternatives. Professor Cooper was the central point for decisions, over and over and over again and, with Professor Rowe and Professor Marcus, provided the research, expertise, and judgment that gave us a reliable basis for many drafting decisions.

This project was uniquely dependent on excellent staff support. Peter G. McCabe, Standing Committee Secretary and Assistant Director, proved the necessary administrative support, even borrowing staff from other parts of his divisions that were already understaffed. John K. Rabiej, Chief of the Rules Committee Support Office, coordinated the work among the various subcommittees and committees, kept us all on the schedule necessary for timely completion, and on top of that work, provided invaluable insight and suggestions on many difficult drafting issues. Jeffrey A. Hennemuth, Robert P. Deyling, James Ishida, and Jeffrey Barr faithfully recorded and tracked the flow and exchange of suggestions, reactions, drafts, and redrafts, documenting every significant step in the process and often suggesting drafting refinements. Judith W. Krivit, Anne P. Rustin, and Gale Mitchell of Peter McCabe's staff provided valuable administrative help.

Professor R. Joseph Kimble of the Thomas Cooley Law School is recognized nationally as a leading scholar and expert in legal writing. His passion for good legal writing is well reflected in his work on this project. Professor Kimble devoted endless hours over several years, drafting alternatives and refinements, reorganizing entire sections of rules, and agonizing over specific words and phrases to achieve clarity, consistency, and simplicity. Joseph F. Spaniol, Jr., consultant to the Style Subcommittee, ably assisted Professor Kimble, bringing a wealth of experience to the project from his years as the Administrative Office's Deputy Director and United States Supreme Court Clerk. One of the pleasures of this project was the opportunity to work with these esteemed professionals.

Those who provided public comment also deserve our thanks. In particular, Professor Stephen Burbank and Gregory Joseph, Esq., and the members of the committee they assembled to scrutinize the published rules, provided an invaluable service, taking the time to give us detailed and thoughtful reactions that in turn allowed us to improve the rules even more.

The members of the Rules Advisory Committee and the Standing Committee, from 2003 to today, selflessly devoted many hours undertaking the unglamourous but crucial review of innumerable drafts. Judge Paul J. Kelly, Jr. and Judge Thomas B. Russell were appointed as chairs of Civil Rules Subcommittees and worked diligently to organize the subcommittees' work and bring it to the full Advisory Committee. All the members of the Advisory Committee reviewed countless documents, emails, and footnotes and patiently worked through the details of sometimes difficult drafting decisions.

Most of all, the members of the Rules Advisory Committee and the Standing Committee understood the value of this project and remained committed to it. The success of the restyled Appellate and Criminal Rules prove the value of this work. The age, length, and complexity of the Civil Rules make the benefits of restyling even more valuable and important. This project is a wonderful use of the Rules Committees and the Rules Enabling Act. Had we not done this work, the rules would have become progressively more difficult to understand and use and more removed from practice. The irony is that if we did our work well – and we have – the new rules will seamlessly take the place of the old. The best sign of our success may be that in a few years, the bench and bar will have forgotten that there ever was a Style Project.

THE STYLE RULES AND FORMS RECOMMENDED FOR APPROVAL

Style Rules 1-86

Style Rules 1-86 are recommended for approval for adoption as follows:

I. SCOPE OF RULES — ONE FORM OF ACTION[1] **Rule 1. Scope and Purpose of Rules**	TITLE I. SCOPE OF RULES; FORM OF ACTION **Rule 1. Scope and Purpose**
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.	These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, Guidelines for Drafting and Editing Court Rules, Administrative Office of the United States Courts (1996) and Bryan Garner, Dictionary of Modern Legal Usage (2d ed. 1995).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are avoided. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion

[1] Rules in effect on December 1, 2004.

or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

4. Rule Numbers

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. Other Changes

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

Rule 2. One Form of Action	Rule 2. One Form of Action
There shall be one form of action to be known as "civil action".	There is one form of action — the civil action.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS **Rule 3. Commencement of Action**	TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS **Rule 3. Commencing an Action**
A civil action is commenced by filing a complaint with the court.	A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4. Summons	Rule 4. Summons
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	**(a) Contents; Amendments.** **(1)** ***Contents.*** A summons must: **(A)** name the court and the parties; **(B)** be directed to the defendant; **(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; **(D)** state the time within which the defendant must appear and defend; **(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; **(F)** be signed by the clerk; and **(G)** bear the court's seal. **(2)** ***Amendments.*** The court may permit a summons to be amended.
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	**(b) Issuance.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) Service with Complaint; by Whom Made. **(1)** A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. **(2)** Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	**(c) Service.** **(1)** ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. **(2)** ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint. **(3)** ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States. **(4)** When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required. **(5)** The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	**(3)** ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States. **(4)** ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver. **(5)** ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.
(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States: **(1)** pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or **(2)** by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.	**(e) Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by: **(1)** following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or **(2)** doing any of the following: **(A)** delivering a copy of the summons and of the complaint to the individual personally; **(B)** leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or **(C)** delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: **(1)** by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or **(2)** if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice **(A)** in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or **(B)** as directed by the foreign authority in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the law of the foreign country, by **(i)** delivery to the individual personally of a copy of the summons and the complaint; or **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or **(3)** by other means not prohibited by international agreement as may be directed by the court.	**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States: **(1)** by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; **(2)** if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice. **(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; **(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the foreign country's law, by: **(i)** delivering a copy of the summons and of the complaint to the individual personally; or **(ii)** using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or **(3)** by other means not prohibited by international agreement, as the court orders.
(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.	**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected: **(1)** in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or **(2)** in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.	**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: **(1)** in a judicial district of the United States: **(A)** in the manner prescribed by Rule 4(e)(1) for serving an individual; or **(B)** by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or **(2)** at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Service Upon Foreign, State, or Local Governments. **(1)** Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608. **(2)** Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.	**(j) Serving a Foreign, State, or Local Government.** **(1)** ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.
(k) Territorial Limits of Effective Service. **(1)** Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant **(A)** who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or **(B)** who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or **(C)** who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or **(D)** when authorized by a statute of the United States. **(2)** If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.	**(k) Territorial Limits of Effective Service.** **(1)** ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: **(A)** who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; **(B)** who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; **(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or **(D)** when authorized by a federal statute. **(2)** ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: **(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and **(B)** exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.	**(l) Proving Service.** **(1)** ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. **(2)** ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows: **(A)** if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or **(B)** if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee. **(3)** ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.
(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).	**(m) Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).
(n) Seizure of Property; Service of Summons Not Feasible. **(1)** If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule. **(2)** Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.	**(n) Asserting Jurisdiction over Property or Assets.** **(1)** ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule. **(2)** ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Service of Other Process	Rule 4.1. Serving Other Process
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).
(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.	**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5. Serving and Filing Pleadings and Other Papers	Rule 5. Serving and Filing Pleadings and Other Papers
(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.	**(a) Service: When Required.** **(1)** ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party: **(A)** an order stating that service is required; **(B)** a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants; **(C)** a discovery paper required to be served on a party, unless the court orders otherwise; **(D)** a written motion, except one that may be heard ex parte; and **(E)** a written notice, appearance, demand, or offer of judgment, or any similar paper. **(2)** ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4. **(3)** ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Making Service. **(1)** Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party. **(2)** Service under Rule 5(a) is made by: **(A)** Delivering a copy to the person served by: **(i)** handing it to the person; **(ii)** leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or **(iii)** if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there. **(B)** Mailing a copy to the last known address of the person served. Service by mail is complete on mailing. **(C)** If the person served has no known address, leaving a copy with the clerk of the court. **(D)** Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities. **(3)** Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.	**(b) Service: How Made.** **(1)** ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. **(2)** ***Service in General.*** A paper is served under this rule by: **(A)** handing it to the person; **(B)** leaving it: **(i)** at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or **(ii)** if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there; **(C)** mailing it to the person's last known address — in which event service is complete upon mailing; **(D)** leaving it with the court clerk if the person has no known address; **(E)** sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or **(F)** delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery. **(3)** ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).
(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: **(A)** defendants' pleadings and replies to them need not be served on other defendants; **(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and **(C)** filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties. **(2)** ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.

(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission. **(e) Filing With the Court Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.	**(d) Filing.** **(1)** ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission. **(2)** ***How Filing Is Made — In General.*** A paper is filed by delivering it: **(A)** to the clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk. **(3)** ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules. **(4)** ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention	Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention
(a) **Notice by a Party.** A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: (A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or (B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged — or on the state attorney general if a state statute is challenged — either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. (b) **Certification by the Court.** The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute. (c) **Intervention; Final Decision on the Merits.** Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional. (d) **No Forfeiture.** A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.	(a) **Notice by a Party.** A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or (B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned — or on the state attorney general if a state statute is questioned — either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose. (b) **Certification by the Court.** The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned. (c) **Intervention; Final Decision on the Merits.** Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional. (d) **No Forfeiture.** A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 6. Time	Rule 6. Computing and Extending Time; Time for Motion Papers
(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusions from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: **(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court may, for good cause, extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) [Rescinded].	
(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: **(A)** when the motion may be heard ex parte; **(B)** when these rules set a different time; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different time. **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.	**(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

III. PLEADINGS AND MOTIONS Rule 7. Pleadings Allowed; Form of Motions	TITLE III. PLEADINGS AND MOTIONS Rule 7. Pleadings Allowed; Form of Motions and Other Papers
(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.	**(a) Pleadings.** Only these pleadings are allowed: **(1)** a complaint; **(2)** an answer to a complaint; **(3)** an answer to a counterclaim designated as a counterclaim; **(4)** an answer to a crossclaim; **(5)** a third-party complaint; **(6)** an answer to a third-party complaint; and **(7)** if the court orders one, a reply to an answer.
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. **(2)** The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. **(3)** All motions shall be signed in accordance with Rule 11.	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. The motion must: **(A)** be in writing unless made during a hearing or trial; **(B)** state with particularity the grounds for seeking the order; and **(C)** state the relief sought. **(2)** ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.
(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	[Current Rule 7(c) is deleted.]

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated

in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement	Rule 7.1. Disclosure Statement
(a) Who Must File; Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.	**(a) Who Must File; Contents.** A nongovernmental corporate party must file two copies of a disclosure statement that: **(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** states that there is no such corporation.
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and **(2)** promptly file a supplemental statement upon any change in the information that the statement requires.	**(b) Time to File; Supplemental Filing.** A party must: **(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and **(2)** promptly file a supplemental statement if any required information changes.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 8. General Rules of Pleading	Rule 8. General Rules of Pleading
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.	**(a) Claim for Relief.** A pleading that states a claim for relief must contain: **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.
(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.	**(b) Defenses; Admissions and Denials.** **(1)** ***In General.*** In responding to a pleading, a party must: **(A)** state in short and plain terms its defenses to each claim asserted against it; and **(B)** admit or deny the allegations asserted against it by an opposing party. **(2)** ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the allegation. **(3)** ***General and Specific Denials.*** A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted. **(4)** ***Denying Part of an Allegation.*** A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest. **(5)** ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. **(6)** ***Effect of Failing to Deny.*** An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.	**(c) Affirmative Defenses.** **(1)** ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • discharge in bankruptcy; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. **(2)** ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.	[Current Rule 8(d) has become restyled Rule 8(b)(6).]

(e) Pleading to Be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.	**(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.** (1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required. (2) *Alternative Statements of a Claim or Defense.* A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. (3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.
(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.	**(e) Construing Pleadings.** Pleadings must be construed so as to do justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters	Rule 9. Pleading Special Matters
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.	**(a) Capacity or Authority to Sue; Legal Existence.** (1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued; (B) a party's authority to sue or be sued in a representative capacity; or (C) the legal existence of an organized association of persons that is made a party. (2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.
(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.	**(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.
(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.	**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.	**(d) Official Document or Act.** In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.
(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.	**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.	**(f) Time and Place.** An allegation of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	**(g) Special Damages.** If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated. **(2)** ***Amending a Designation.*** Rule 15 governs amending a pleading to add or withdraw a designation. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 10. Form of Pleadings	Rule 10. Form of Pleadings
(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.	**(a) Caption; Names of Parties.** Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.
(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.	**(b) Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.	**(c) Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions	Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.	**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.	**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.	**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings	Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
(a) When Presented. **(1)** Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer **(A)** within 20 days after being served with the summons and complaint, or **(B)** if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. **(2)** A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. **(3)** **(A)** The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim. **(B)** An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.	**(a) Time to Serve a Responsive Pleading.** **(1)** ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: **(A)** A defendant must serve an answer: **(i)** within 20 days after being served with the summons and complaint; or **(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States. **(B)** A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim. **(C)** A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time. **(2)** ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney. **(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: **(A)** if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or **(B)** if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.	**(4)** ***Effect of a Motion.*** Unless the court sets a different time, serving a motion under this rule alters these periods as follows: **(A)** if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or **(B)** if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: **(1)** lack of subject-matter jurisdiction; **(2)** lack of personal jurisdiction; **(3)** improper venue; **(4)** insufficient process; **(5)** insufficient service of process; **(6)** failure to state a claim upon which relief can be granted; and **(7)** failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.
(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	**(c) Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.
	(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.	[Current Rule 12(d) has become restyled Rule 12(i).]
(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: **(1)** on its own; or **(2)** on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.	**(g) Joining Motions.** **(1)** ***Right to Join.*** A motion under this rule may be joined with any other motion allowed by this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiver or Preservation of Certain Defenses. **(1)** A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. **(2)** A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. **(3)** Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.	**(h) Waiving and Preserving Certain Defenses.** **(1)** ***When Some Are Waived.*** A party waives any defense listed in Rule 12(b)(2)-(5) by: **(A)** omitting it from a motion in the circumstances described in Rule 12(g)(2); or **(B)** failing to either: **(i)** make it by motion under this rule; or **(ii)** include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course. **(2)** ***When to Raise Others.*** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised: **(A)** in any pleading allowed or ordered under Rule 7(a); **(B)** by a motion under Rule 12(c); or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
	(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Crossclaim
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.	**(a) Compulsory Counterclaim.** **(1)** ***In General.*** A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim: **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and **(B)** does not require adding another party over whom the court cannot acquire jurisdiction. **(2)** ***Exceptions.*** The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of another pending action; or **(B)** the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.	**(b) Permissive Counterclaim.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.
(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.	**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.
(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.	**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.
(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.	**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(g) Cross-Claim Against Co-party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.	**(g) Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.	**(h) Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.	**(i) Separate Trials; Separate Judgments.** If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third–Party Practice	Rule 14. Third-Party Practice
(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer. **(2)** ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant": **(A)** must assert any defense against the third-party plaintiff's claim under Rule 12; **(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g); **(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and **(D)** may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. **(3)** ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g). **(4)** ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately. **(5)** ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it. **(6)** ***Third-Party Complaint In Rem.*** If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.	**(b) When a Plaintiff May Bring in a Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.
(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.	**(c) Admiralty or Maritime Claim.** **(1)** ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. **(2)** ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings	Rule 15. Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.	**(a) Amendments Before Trial.** **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course: **(A)** before being served with a responsive pleading; or **(B)** within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar. **(2)** ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires. **(3)** ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.
(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.	**(b) Amendments During and After Trial.** **(1)** ***Based on an Objection at Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence. **(2)** ***For Issues Tried by Consent.*** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.–But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when **(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, or **(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.	**(c) Relation Back of Amendments.** **(1)** ***When an Amendment Relates Back.*** An amendment to a pleading relates back to the date of the original pleading when: **(A)** the law that provides the applicable statute of limitations allows relation back; **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and **(ii)** knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. **(2)** ***Notice to the United States.*** When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.
(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.	**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

Rule 16. Pretrial Conferences; Scheduling; Management	Rule 16. Pretrial Conferences; Scheduling; Management
(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as **(1)** expediting the disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation, and; **(5)** facilitating the settlement of the case.	**(a) Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: **(1)** expediting disposition of the action; **(2)** establishing early and continuing control so that the case will not be protracted because of lack of management; **(3)** discouraging wasteful pretrial activities; **(4)** improving the quality of the trial through more thorough preparation; and **(5)** facilitating settlement.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time **(1)** to join other parties and to amend the pleadings; **(2)** to file motions; and **(3)** to complete discovery. The scheduling order also may include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; **(5)** the date or dates for conferences before trial, a final pretrial conference, and trial; and **(6)** any other matters appropriate in the circumstances of the case. The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.	**(b) Scheduling.** **(1)** ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order: **(A)** after receiving the parties' report under Rule 26(f); or **(B)** after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means. **(2)** ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared. **(3)** ***Contents of the Order.*** **(A)** *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. **(B)** *Permitted Contents.* The scheduling order may: **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii)** modify the extent of discovery; **(iii)** set dates for pretrial conferences and for trial; and **(iv)** include other appropriate matters. **(4)** ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to **(1)** the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; **(2)** the necessity or desirability of amendments to the pleadings; **(3)** the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence; **(4)** the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence; **(5)** the appropriateness and timing of summary adjudication under Rule 56; **(6)** the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;	**(c) Attendance and Matters for Consideration at a Pretrial Conference.** **(1)** ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement. **(2)** ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters: **(A)** formulating and simplifying the issues, and eliminating frivolous claims or defenses; **(B)** amending the pleadings if necessary or desirable; **(C)** obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence; **(D)** avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702; **(E)** determining the appropriateness and timing of summary adjudication under Rule 56; **(F)** controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial; **(8)** the advisability of referring matters to a magistrate judge or master; **(9)** settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule; **(10)** the form and substance of the pretrial order; **(11)** the disposition of pending motions; **(12)** the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; **(13)** an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case; **(14)** an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c); **(15)** an order establishing a reasonable limit on the time allowed for presenting evidence; and **(16)** such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.	**(G)** identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial; **(H)** referring matters to a magistrate judge or a master; **(I)** settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule; **(J)** determining the form and content of the pretrial order; **(K)** disposing of pending motions; **(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; **(M)** ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue; **(N)** ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c); **(O)** establishing a reasonable limit on the time allowed to present evidence; and **(P)** facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.	**(d) Pretrial Orders.** After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.
(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.	**(e) Final Pretrial Conference and Orders.** The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.	**(f) Sanctions.** **(1)** ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney: **(A)** fails to appear at a scheduling or other pretrial conference; **(B)** is substantially unprepared to participate — or does not participate in good faith — in the conference; or **(C)** fails to obey a scheduling or other pretrial order. **(2)** ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

IV. PARTIES Rule 17. Parties Plaintiff and Defendant; Capacity	TITLE IV. PARTIES Rule 17. Plaintiff and Defendant; Capacity; Public Officers
(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.	**(a) Real Party in Interest.** **(1)** ***Designation in General.*** An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: **(A)** an executor; **(B)** an administrator; **(C)** a guardian; **(D)** a bailee; **(E)** a trustee of an express trust; **(F)** a party with whom or in whose name a contract has been made for another's benefit; and **(G)** a party authorized by statute. **(2)** ***Action in the Name of the United States for Another's Use or Benefit.*** When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States. **(3)** ***Joinder of the Real Party in Interest.*** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).	**(b) Capacity to Sue or Be Sued.** Capacity to sue or be sued is determined as follows: **(1)** for an individual who is not acting in a representative capacity, by the law of the individual's domicile; **(2)** for a corporation, by the law under which it was organized; and **(3)** for all other parties, by the law of the state where the court is located, except that: **(A)** a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and **(B)** 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.
(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.	**(c) Minor or Incompetent Person.** **(1)** ***With a Representative.*** The following representatives may sue or defend on behalf of a minor or an incompetent person: **(A)** a general guardian; **(B)** a committee; **(C)** a conservator; or **(D)** a like fiduciary. **(2)** ***Without a Representative.*** A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.
	(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Rule 18. Joinder of Claims and Remedies	Rule 18. Joinder of Claims
(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.	**(a) In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.
(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.	**(b) Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

Rule 19. Joinder of Persons Needed for Just Adjudication	Rule 19. Required Joinder of Parties
(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.	**(a) Persons Required to Be Joined if Feasible.** **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: **(i)** as a practical matter impair or impede the person's ability to protect the interest; or **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. **(2)** ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff. **(3)** ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.
(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.	**(b) When Joinder Is Not Feasible.** If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: **(1)** the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; **(2)** the extent to which any prejudice could be lessened or avoided by: **(A)** protective provisions in the judgment; **(B)** shaping the relief; or **(C)** other measures; **(3)** whether a judgment rendered in the person's absence would be adequate; and **(4)** whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.	**(c) Pleading the Reasons for Nonjoinder.** When asserting a claim for relief, a party must state: **(1)** the name, if known, of any person who is required to be joined if feasible but is not joined; and **(2)** the reasons for not joining that person.
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.	**(d) Exception for Class Actions.** This rule is subject to Rule 23.

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Rule 20. Permissive Joinder of Parties	Rule 20. Permissive Joinder of Parties
(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.	**(a) Persons Who May Join or Be Joined.** **(1)** ***Plaintiffs.*** Persons may join in one action as plaintiffs if: **(A)** they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all plaintiffs will arise in the action. **(2)** ***Defendants.*** Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if: **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and **(B)** any question of law or fact common to all defendants will arise in the action. **(3)** ***Extent of Relief.*** Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.
(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.	**(b) Protective Measures.** The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 21. Misjoinder and Non-Joinder of Parties	Rule 21. Misjoinder and Nonjoinder of Parties
Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.	Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 22. Interpleader	Rule 22. Interpleader
(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20. (2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.	**(a) Grounds.** **(1)** ***By a Plaintiff.*** Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though: **(A)** the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or **(B)** the plaintiff denies liability in whole or in part to any or all of the claimants. **(2)** ***By a Defendant.*** A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim. **(b) Relation to Other Rules and Statutes.** This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23. Class Actions	Rule 23. Class Actions
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.	**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if: **(1)** the class is so numerous that joinder of all members is impracticable; **(2)** there are questions of law or fact common to the class; **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and **(4)** the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or **(2)** the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or **(3)** the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.	**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if: **(1)** prosecuting separate actions by or against individual class members would create a risk of: **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; **(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and **(D)** the likely difficulties in managing a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) (A) When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. **(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.	**(3)** ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must: **(A)** for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and **(B)** for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members. **(4)** ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues. **(5)** ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.
(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.	**(d) Conducting the Action.** **(1)** ***In General.*** In conducting an action under this rule, the court may issue orders that: **(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument; **(B)** require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of: **(i)** any step in the action; **(ii)** the proposed extent of the judgment; or **(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action; **(C)** impose conditions on the representative parties or on intervenors; **(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or **(E)** deal with similar procedural matters. **(2)** ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. **(1)** **(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. **(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. **(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. **(2)** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise. **(3)** In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. **(4)** **(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A). **(B)** An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.	**(e)** **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: **(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal. **(2)** If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. **(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal. **(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so. **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.	**(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.
(g) Class Counsel. **(1) Appointing Class Counsel.** **(A)** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. **(B)** An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class. **(C)** In appointing class counsel, the court **(i)** must consider: • the work counsel has done in identifying or investigating potential claims in the action, • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, • counsel's knowledge of the applicable law, and • the resources counsel will commit to representing the class; **(ii)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; **(iii)** may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and **(iv)** may make further orders in connection with the appointment.	**(g) Class Counsel.** **(1)** ***Appointing Class Counsel.*** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: **(A)** must consider: **(i)** the work counsel has done in identifying or investigating potential claims in the action; **(ii)** counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; **(iii)** counsel's knowledge of the applicable law; and **(iv)** the resources that counsel will commit to representing the class; **(B)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; **(C)** may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; **(D)** may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and **(E)** may make further orders in connection with the appointment.
(2) Appointment Procedure. **(A)** The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. **(B)** When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class. **(C)** The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).	**(2)** ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class. **(3)** ***Interim Counsel.*** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action. **(4)** ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows: **(1) Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. **(2) Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion. **(3) Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a). **(4) Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).	**(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply: **(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. **(2)** A class member, or a party from whom payment is sought, may object to the motion. **(3)** The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a). **(4)** The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Rule 23.1. Derivative Actions by Shareholders	Rule 23.1. Derivative Actions
In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.	**(a) Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association. **(b) Pleading Requirements.** The complaint must be verified and must: **(1)** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law; **(2)** allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and **(3)** state with particularity: **(A)** any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and **(B)** the reasons for not obtaining the action or not making the effort. **(c) Settlement, Dismissal, and Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE NOTE

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23.2. Actions Relating to Unincorporated Associations	Rule 23.2. Actions Relating to Unincorporated Associations
An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).	This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

COMMITTEE NOTE

The language of Rule 23.2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 24. Intervention	Rule 24. Intervention
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.	**(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who: **(1)** is given an unconditional right to intervene by a federal statute; or **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.	**(b) Permissive Intervention.** **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who: **(A)** is given a conditional right to intervene by a federal statute; or **(B)** has a claim or defense that shares with the main action a common question of law or fact. **(2)** ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: **(A)** a statute or executive order administered by the officer or agency; or **(B)** any regulation, order, requirement, or agreement issued or made under the statute or executive order. **(3)** ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.	**(c) Procedure.** **(1)** ***Notice and Pleading Required.*** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought. **(2)** ***Challenge to a Statute; Court's Duty.*** When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify: **(A)** the Attorney General of the United States, if a federal statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and **(B)** the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party. **(3)** ***Party's Responsibility.*** A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

Rule 25. Substitution of Parties	Rule 25. Substitution of Parties
(a) Death. **(1)** If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party. **(2)** In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.	**(a) Death.** **(1)** ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed. **(2)** ***Continuation Among the Remaining Parties.*** After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record. **(3)** ***Service.*** A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.
(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.	**(b) Incompetency.** If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).
(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.	**(c) Transfer of Interest.** If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation From Office. **(1)** When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. **(2)** A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.	**(d) Public Officers; Death or Separation from Office.** An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution. [Current Rule 25(d)(2) has become restyled Rule 17(d).]

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

V. DEPOSITIONS AND DISCOVERY Rule 26. General Provisions Governing Discovery; Duty of Disclosure	TITLE V. DISCLOSURES AND DISCOVERY Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) Required Disclosures; Methods to Discover Additional Matter. **(1) Initial Disclosures.** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: **(A)** the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information; **(B)** a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;	**(a) Required Disclosures.** **(1)** *Initial Disclosure.* **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; **(ii)** a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and **(D)** for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.	**(iii)** a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and **(iv)** for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1): (i) an action for review on an administrative record; (ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; (iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (iv) an action to enforce or quash an administrative summons or subpoena; (v) an action by the United States to recover benefit payments; (vi) an action by the United States to collect on a student loan guaranteed by the United States; (vii) a proceeding ancillary to proceedings in other courts; and (viii) an action to enforce an arbitration award.	**(B)** *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure: **(i)** an action for review on an administrative record; **(ii)** a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence; **(iii)** an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision; **(iv)** an action to enforce or quash an administrative summons or subpoena; **(v)** an action by the United States to recover benefit payments; **(vi)** an action by the United States to collect on a student loan guaranteed by the United States; **(vii)** a proceeding ancillary to a proceeding in another court; and **(viii)** an action to enforce an arbitration award.
These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures – if any – are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.	**(C)** *Time for Initial Disclosures — In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure. **(D)** *Time for Initial Disclosures — For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order. **(E)** *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony. **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.	**(2)** ***Disclosure of Expert Testimony.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. **(B)** *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the data or other information considered by the witness in forming them; **(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous ten years; **(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and **(vi)** a statement of the compensation to be paid for the study and testimony in the case.
(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).	**(C)** *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made: **(i)** at least 90 days before the date set for trial or for the case to be ready for trial; or **(ii)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure. **(D)** *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment: **(A)** the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises; **(B)** the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and **(C)** an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.	**(3)** ***Pretrial Disclosures.*** **(A)** *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: **(i)** the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises; **(ii)** the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and **(iii)** an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises. **(B)** *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.
(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served. **(5) Methods to Discover Additional Matter.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.	**(4)** ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served. [Current Rule 26(a)(5) is deleted.]

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).	**(b) Discovery Scope and Limits.** **(1)** ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(B).
(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).	**(2)** ***Limitations on Frequency and Extent.*** **(A)** *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. **(B)** *When Required.* The court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: **(i)** the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; **(ii)** the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. **(C)** *On Motion or the Court's Own Initiative.* The court may act on motion or on its own after reasonable notice.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.	**(3)** ***Trial Preparation: Materials.*** **(A)** *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: **(i)** they are otherwise discoverable under Rule 26(b)(1); and **(ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. **(B)** *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. **(C)** *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: **(i)** a written statement that the person has signed or otherwise adopted or approved; or **(ii)** a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts. **(A)** A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided. **(B)** A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. **(C)** Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.	**(4)** ***Trial Preparation: Experts.*** **(A)** *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided. **(B)** *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: **(i)** as provided in Rule 35(b); or **(ii)** on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. **(C)** *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery: **(i)** pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and **(ii)** for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.
(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.	**(5)** ***Claiming Privilege or Protecting Trial-Preparation Materials.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: **(A)** expressly make the claim; and **(B)** describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(1)** that the disclosure or discovery not be had; **(2)** that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; **(3)** that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; **(4)** that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;	**(c) Protective Orders.** **(1)** ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: **(A)** forbidding the disclosure or discovery; **(B)** specifying terms, including time and place, for the disclosure or discovery; **(C)** prescribing a discovery method other than the one selected by the party seeking discovery; **(D)** forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(5) that discovery be conducted with no one present except persons designated by the court; **(6)** that a deposition, after being sealed, be opened only by order of the court; **(7)** that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and **(8)** that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(E)** designating the persons who may be present while the discovery is conducted; **(F)** requiring that a deposition be sealed and opened only on court order; **(G)** requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and **(H)** requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs. **(2)** ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. **(3)** ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.	**(d) Timing and Sequence of Discovery.** **(1)** ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order. **(2)** ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: **(A)** methods of discovery may be used in any sequence; and **(B)** discovery by one party does not require any other party to delay its discovery.
(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances: **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.	**(e) Supplementing Disclosures and Responses.** **(1)** ***In General.*** A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response: **(A)** in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or **(B)** as ordered by the court.
(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.	**(2)** ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties' views and proposals concerning: **(1)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; **(2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; **(3)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(4)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.	**(f) Conference of the Parties; Planning for Discovery.** **(1)** ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b). **(2)** ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(D)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). **(4)** ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule: **(A)** require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and **(B)** require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections. **(1)** Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made. **(2)** Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: **(A)** consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; **(B)** not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and **(C)** not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed. **(3)** If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.	**(g) Signing Disclosures and Discovery Requests, Responses, and Objections.** **(1)** ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: **(A)** with respect to a disclosure, it is complete and correct as of the time it is made; and **(B)** with respect to a discovery request, response, or objection, it is: **(i)** consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; **(ii)** not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and **(iii)** neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. **(2)** ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention. **(3)** ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout

the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Rule 27. Depositions before Action or Pending Appeal	Rule 27. Depositions to Perpetuate Testimony
(a) Before Action. **(1) Petition.** A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.	**(a) Before an Action Is Filed.** **(1)** ***Petition.*** A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show: **(A)** that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; **(B)** the subject matter of the expected action and the petitioner's interest; **(C)** the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it; **(D)** the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and **(E)** the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.	(2) ***Notice and Service.*** At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.
(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed. **(4) Use of Deposition.** If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).	(3) ***Order and Examination.*** If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed. (4) ***Using the Deposition.*** A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.	**(b) Pending Appeal.** **(1)** ***In General.*** The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court. **(2)** ***Motion.*** The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show: **(A)** the name, address, and expected substance of the testimony of each deponent; and **(B)** the reasons for perpetuating the testimony. **(3)** ***Court Order.*** If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.
(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.	**(c) Perpetuation by an Action.** This rule does not limit a court's power to entertain an action to perpetuate testimony.

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Persons Before Whom Depositions May Be Taken	Rule 28. Persons Before Whom Depositions May Be Taken
(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.	**(a) Within the United States.** **(1)** ***In General.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before: **(A)** an officer authorized to administer oaths either by federal law or by the law in the place of examination; or **(B)** a person appointed by the court where the action is pending to administer oaths and take testimony. **(2)** ***Definition of "Officer."*** The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).
(b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.	**(b) In a Foreign Country.** **(1)** ***In General.*** A deposition may be taken in a foreign country: **(A)** under an applicable treaty or convention; **(B)** under a letter of request, whether or not captioned a "letter rogatory"; **(C)** on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or **(D)** before a person commissioned by the court to administer any necessary oath and take testimony. **(2)** ***Issuing a Letter of Request or a Commission.*** A letter of request, a commission, or both may be issued: **(A)** on appropriate terms after an application and notice of it; and **(B)** without a showing that taking the deposition in another manner is impracticable or inconvenient. **(3)** ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken. **(4)** ***Letter of Request — Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.	**(c) Disqualification.** A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Stipulations Regarding Discovery Procedure	Rule 29. Stipulations About Discovery Procedure
Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.	Unless the court orders otherwise, the parties may stipulate that: **(a)** a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and **(b)** other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Depositions Upon Oral Examination	Rule 30. Depositions by Oral Examination
(a) When Depositions May Be Taken; When Leave Required. **(1)** A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. **(2)** A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants; **(B)** the person to be examined already has been deposed in the case; or **(C)** a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.	**(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or **(B)** if the deponent is confined in prison.
(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. **(1)** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.	**(b) Notice of the Deposition; Other Formal Requirements.** **(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. **(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. **(3)** With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.	**(3)** ***Method of Recording.*** **(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically. **(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. **(4)** ***By Remote Means.*** The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.
(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters. **(5)** The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.	**(5)** ***Officer's Duties.*** **(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes: **(i)** the officer's name and business address; **(ii)** the date, time, and place of the deposition; **(iii)** the deponent's name; **(iv)** the officer's administration of the oath or affirmation to the deponent; and **(v)** the identity of all persons present. **(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques. **(C)** *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules. **(7)** The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.	**(6)** ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.
(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.	**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.** **(1)** ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. **(2)** ***Objections.*** An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). **(3)** ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination. **(1)** Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4). **(2)** Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination. **(3)** If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.	**(d) Duration; Sanction; Motion to Terminate or Limit.** **(1)** ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination. **(2)** ***Sanction.*** The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.
(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(3)** ***Motion to Terminate or Limit.*** **(A)** *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. **(B)** *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. **(C)** *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.	**(e) Review by the Witness; Changes.** **(1)** ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: **(A)** to review the transcript or recording; and **(B)** if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them. **(2)** ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery by Officer; Exhibits; Copies. (1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.	**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.** (1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. (2) ***Documents and Tangible Things.*** (A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may: (i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or (ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition. (B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.
(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent. (3) The party taking the deposition shall give prompt notice of its filing to all other parties.	(3) ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. (4) ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend or to Serve Subpoena; Expenses. **(1)** If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees. **(2)** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.	**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to: **(1)** attend and proceed with the deposition; or **(2)** serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31. Depositions Upon Written Questions	Rule 31. Depositions by Written Questions
(a) Serving Questions; Notice. **(1)** A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. **(2)** A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, **(A)** a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants; **(B)** the person to be examined has already been deposed in the case; or **(C)** a party seeks to take a deposition before the time specified in Rule 26(d).	**(a) When a Deposition May Be Taken.** **(1)** ***Without Leave.*** A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45. **(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): **(A)** if the parties have not stipulated to the deposition and: **(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; **(ii)** the deponent has already been deposed in the case; or **(iii)** the party seeks to take a deposition before the time specified in Rule 26(d); or **(B)** if the deponent is confined in prison.
(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6). **(4)** Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.	**(3)** ***Service; Required Notice.*** A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken. **(4)** ***Questions Directed to an Organization.*** A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). **(5)** ***Questions from Other Parties.*** Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.	**(b) Delivery to the Officer; Officer's Duties.** The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to: **(1)** take the deponent's testimony in response to the questions; **(2)** prepare and certify the deposition; and **(3)** send it to the party, attaching a copy of the questions and of the notice.
(c) Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.	**(c) Notice of Filing.** A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 32. Use of Depositions in Court Proceedings	Rule 32. Using Depositions in Court Proceedings
(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:	**(a) Using Depositions.** **(1)** ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions: **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it; **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and **(C)** the use is allowed by Rule 32(a)(2) through (8).
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence. **(2)** The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.	**(2)** ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence. **(3)** ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: **(A)** that the witness is dead; or **(B)** that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or **(C)** that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or **(D)** that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or **(E)** upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.	**(4)** ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: **(A)** that the witness is dead; **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition; **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or **(E)** on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.	**(5)** ***Limitations on Use.*** **(A)** *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken. **(B)** *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.
(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.	**(6)** ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. **(7)** ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken. **(8)** ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.	**(b) Objections to Admissibility.** Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.
(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.	**(c) Form of Presentation.** Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Effect of Errors and Irregularities in Depositions. **(1) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice. **(2) As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. **(3) As to Taking of Deposition.** **(A)** Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. **(B)** Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.	**(d) Waiver of Objections.** **(1)** ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. **(2)** ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made: **(A)** before the deposition begins; or **(B)** promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. **(3)** ***To the Taking of the Deposition.*** **(A)** *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. **(B)** *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if: **(i)** it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and **(ii)** it is not timely made during the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.	(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.
(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.	(4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 32(a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "a hearing or trial."

The final paragraph of former Rule 32(a) allowed use in a later action of a deposition "lawfully taken and duly filed in the former action." Because of the 2000 amendment of Rule 5(d), many depositions are not filed. Amended Rule 32(a)(8) reflects this change by excluding use of an unfiled deposition only if filing was required in the former action.

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).	**(a) In General.** **(1)** ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2). **(2)** ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.
(b) Answers and Objections. **(1)** Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. **(2)** The answers are to be signed by the person making them, and the objections signed by the attorney making them. **(3)** The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. **(4)** All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. **(5)** The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.	**(b) Answers and Objections.** **(1)** ***Responding Party.*** The interrogatories must be answered: **(A)** by the party to whom they are directed; or **(B)** if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party. **(2)** ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(3)** ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath. **(4)** ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. **(5)** ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.	**(c) Use.** An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.
(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.	**(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: **(1)** specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and **(2)** giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Former Rule 33(b)(5) was a redundant reminder of Rule 37(a) procedure that is omitted as no longer useful.

Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "necessarily."

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control: **(A)** any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or **(B)** any tangible things — and to test or sample these things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d). The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.	**(b) Procedure.** **(1)** ***Contents of the Request.*** The request must: **(A)** describe with reasonable particularity each item or category of items to be inspected; and **(B)** specify a reasonable time, place, and manner for the inspection and for performing the related acts. **(2)** ***Responses and Objections.*** **(A)** *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. **(B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. **(C)** *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. **(D)** *Producing the Documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.	**(c) Nonparties.** As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 35. Physical and Mental Examinations of Persons	Rule 35. Physical and Mental Examinations
(a) Order for Examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.	**(a) Order for an Examination.** **(1)** ***In General.*** The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. **(2)** ***Motion and Notice; Contents of the Order.*** The order: **(A)** may be made only on motion for good cause and on notice to all parties and the person to be examined; and **(B)** must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.
(b) Report of Examiner. **(1)** If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it.	**(b) Examiner's Report.** **(1)** ***Request by the Party or Person Examined.*** The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. **(2)** ***Contents.*** The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. **(3)** ***Request by the Moving Party.*** After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial. **(2)** By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition. **(3)** This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.	**(4)** ***Waiver of Privilege.*** By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition. **(5)** ***Failure to Deliver a Report.*** The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. **(6)** ***Scope.*** This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 36. Requests for Admission	Rule 36. Requests for Admission
(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d). Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.	**(a) Scope and Procedure.** **(1)** ***Scope.*** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: **(A)** facts, the application of law to fact, or opinions about either; and **(B)** the genuineness of any described documents. **(2)** ***Form; Copy of a Document.*** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying. **(3)** ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court. **(4)** ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.	**(5)** ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial. **(6)** ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.	**(b) Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions	Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows: **(1) Appropriate Court.** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken. **(2) Motion.** **(A)** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.	**(a) Motion for an Order Compelling Disclosure or Discovery.** **(1)** *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action. **(2)** *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken. **(3)** *Specific Motions.* **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.
(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. **(3) Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.	**(B)** *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if: **(i)** a deponent fails to answer a question asked under Rule 30 or 31; **(ii)** a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4); **(iii)** a party fails to answer an interrogatory submitted under Rule 33; or **(iv)** a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34. **(C)** *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order. **(4)** *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. **(A)** If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust. **(B)** If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. **(C)** If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.	**(5)** ***Payment of Expenses; Protective Orders.*** **(A)** *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if: **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or **(iii)** other circumstances make an award of expenses unjust. **(B)** *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust. **(C)** *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply With Order. **(1) Sanctions by Court in District Where Deposition Is Taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. **(2) Sanctions by Court in Which Action Is Pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: **(A)** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; **(B)** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; **(C)** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; **(D)** In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;	**(b) Failure to Comply with a Court Order.** **(1)** ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. **(2)** ***Sanctions in the District Where the Action Is Pending.*** **(A)** *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; **(iii)** striking pleadings in whole or in part; **(iv)** staying further proceedings until the order is obeyed; **(v)** dismissing the action or proceeding in whole or in part; **(vi)** rendering a default judgment against the disobedient party; or **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.
(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.	**(B)** *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person. **(C)** *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. **(1)** A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure. **(2)** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.	**(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.** **(1)** ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure; **(B)** may inform the jury of the party's failure; and **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). **(2)** ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless: **(A)** the request was held objectionable under Rule 36(a); **(B)** the admission sought was of no substantial importance; **(C)** the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or **(D)** there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.	**(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.** **(1)** *In General.* **(A)** *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if: **(i)** a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or **(ii)** a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response. **(B)** *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.
The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).	**(2)** ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c). **(3)** ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.
(e) [Abrogated.]	
(f) [Repealed.]	

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.	**(e) Failure to Participate in Framing a Discovery Plan.** If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VI. TRIALS Rule 38. Jury Trial of Right	TITLE VI. TRIALS Rule 38. Right to a Jury Trial; Demand
(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.	**(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.
(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.	**(b) Demand.** On any issue triable of right by a jury, a party may demand a jury trial by: **(1)** serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and **(2)** filing the demand in accordance with Rule 5(d).
(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.	**(c) Specifying Issues.** In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.
(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.	**(d) Waiver; Withdrawal.** A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.
(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).	**(e) Admiralty and Maritime Claims.** These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 39. Trial by Jury or by the Court	Rule 39. Trial by Jury or by the Court
(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.	**(a) When a Demand Is Made.** When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: **(1)** the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or **(2)** the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.
(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.	**(b) When No Demand Is Made.** Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.	**(c) Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own: **(1)** may try any issue with an advisory jury; or **(2)** may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

COMMITTEE NOTE

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40. Assignment of Cases for Trial	Rule 40. Scheduling Cases for Trial
The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.	Each court must provide by rule for scheduling trials without request — or on a party's request with notice to the other parties. The court must give priority to actions entitled to priority by a federal statute.

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 41. Dismissal of Actions	Rule 41. Dismissal of Actions
(a) Voluntary Dismissal: Effect Thereof. **(1) By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.	**(a) Voluntary Dismissal.** **(1)** ***By the Plaintiff.*** **(A)** *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing: **(i)** a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or **(ii)** a stipulation of dismissal signed by all parties who have appeared. **(B)** *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.
(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.	**(2)** ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.	**(b) Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.	**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made: **(1)** before a responsive pleading is served; or **(2)** if there is no responsive pleading, before evidence is introduced at a hearing or trial.
(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.	**(d) Costs of a Previously Dismissed Action.** If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: **(1)** may order the plaintiff to pay all or part of the costs of that previous action; and **(2)** may stay the proceedings until the plaintiff has complied.

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

Rule 42. Consolidation; Separate Trials	Rule 42. Consolidation; Separate Trials
(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.	**(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may: **(1)** join for hearing or trial any or all matters at issue in the actions; **(2)** consolidate the actions; or **(3)** issue any other orders to avoid unnecessary cost or delay.
(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.	**(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking of Testimony	Rule 43. Taking Testimony
(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.	**(a) In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.
(b) [Abrogated.]	
(c) [Abrogated.]	
(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.	**(b) Affirmation Instead of an Oath.** When these rules require an oath, a solemn affirmation suffices.
(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.	**(c) Evidence on a Motion.** When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.
(f) Interpreters. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.	**(d) Interpreter.** The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44. Proof of Official Record	Rule 44. Proving an Official Record
(a) Authentication. **(1) Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.	**(a) Means of Proving.** **(1)** ***Domestic Record.*** Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States: **(A)** an official publication of the record; or **(B)** a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal: **(i)** by a judge of a court of record in the district or political subdivision where the record is kept; or **(ii)** by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.
(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.	**(2)** ***Foreign Record.*** **(A)** *In General.* Each of the following evidences a foreign official record — or an entry in it — that is otherwise admissible: **(i)** an official publication of the record; or **(ii)** the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.	**(B)** *Final Certification of Genuineness.* A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. **(C)** *Other Means of Proof.* If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either: **(i)** admit an attested copy without final certification; or **(ii)** permit the record to be evidenced by an attested summary with or without a final certification.
(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.	**(b) Lack of a Record.** A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).
(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.	**(c) Other Proof.** A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44.1. Determination of Foreign Law	Rule 44.1. Determining Foreign Law
A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.	A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

COMMITTEE NOTE

The language of Rule 44.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 45. Subpoena	Rule 45. Subpoena
(a) Form; Issuance. **(1)** Every subpoena shall **(A)** state the name of the court from which it is issued; and **(B)** state the title of the action, the name of the court in which it is pending, and its civil action number; and **(C)** command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and **(D)** set forth the text of subdivisions (c) and (d) of this rule. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.	**(a) In General.** **(1)** ***Form and Contents.*** **(A)** *Requirements — In General.* Every subpoena must: **(i)** state the court from which it issued; **(ii)** state the title of the action, the court in which it is pending, and its civil-action number; **(iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce and permit the inspection and copying of designated documents or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and **(iv)** set out the text of Rule 45(c) and (d). **(B)** *Command to Attend a Deposition — Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony. **(C)** *Command to Produce Materials or Permit Inspection.* A command to produce documents or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.
(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.	**(2)** ***Issued from Which Court.*** A subpoena must issue as follows: **(A)** for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held; **(B)** for attendance at a deposition, from the court for the district where the deposition is to be taken; and **(C)** for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of **(A)** a court in which the attorney is authorized to practice; or **(B)** a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.	**(3)** ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of: **(A)** a court in which the attorney is authorized to practice; or **(B)** a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.
(b) Service. **(1)** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).	**(b) Service.** **(1)** ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783. **(3)** Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.	**(2)** ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place: **(A)** within the district of the issuing court; **(B)** outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; **(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or **(D)** that the court authorizes on motion and for good cause, if a federal statute so provides. **(3)** ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country. **(4)** ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.
(c) Protection of Persons Subject to Subpoenas. **(1)** A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.	**(c) Protecting a Person Subject to a Subpoena.** **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. **(B)** Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.	**(2)** ***Command to Produce Materials or Permit Inspection.*** **(A)** *Appearance Not Required.* A person commanded to produce documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial. **(B)** *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the materials or to inspecting the premises. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply: **(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, inspection, or copying. **(ii)** Inspection and copying may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.
(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it **(i)** fails to allow reasonable time for compliance; **(ii)** requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or **(iii)** requires disclosure of privileged or other protected matter and no exception or waiver applies, or **(iv)** subjects a person to undue burden.	**(3)** ***Quashing or Modifying a Subpoena.*** **(A)** *When Required.* On timely motion, the issuing court must quash or modify a subpoena that: **(i)** fails to allow a reasonable time to comply; **(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held; **(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or **(iv)** subjects a person to undue burden.

(B) If a subpoena **(i)** requires disclosure of a trade secret or other confidential research, development, or commercial information, or **(ii)** requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or **(iii)** requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.	**(B)** *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: **(i)** disclosing a trade secret or other confidential research, development, or commercial information; **(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or **(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial. **(C)** *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party: **(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and **(ii)** ensures that the subpoenaed person will be reasonably compensated.
(d) Duties in Responding to Subpoena. **(1)** A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand. **(2)** When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.	**(d) Duties in Responding to a Subpoena.** **(1)** ***Producing Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. **(2)** ***Claiming Privilege or Protection.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: **(A)** expressly make the claim; and **(B)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).	**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Rule 46. Exceptions Unnecessary	Rule 46. Objecting to a Ruling or Order
Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.	A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 47. Selection of Jurors	Rule 47. Selecting Jurors
(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.	**(a) Examining Jurors.** The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.
(b) Peremptory Challenges. The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.	**(b) Peremptory Challenges.** The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.
(c) Excuse. The court may for good cause excuse a juror from service during trial or deliberation.	**(c) Excusing a Juror.** During trial or deliberation, the court may excuse a juror for good cause.

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 48. Number of Jurors—Participation in Verdict	Rule 48. Number of Jurors; Verdict
The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.	A jury must initially have at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 49. Special Verdicts and Interrogatories	Rule 49. Special Verdict; General Verdict and Questions
(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.	**(a) Special Verdict.** **(1)** ***In General.*** The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by: **(A)** submitting written questions susceptible of a categorical or other brief answer; **(B)** submitting written forms of the special findings that might properly be made under the pleadings and evidence; or **(C)** using any other method that the court considers appropriate.
The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.	**(2)** ***Instructions.*** The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue. **(3)** ***Issues Not Submitted.*** A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.	**(b) General Verdict with Answers to Written Questions.** **(1)** ***In General.*** The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both. **(2)** ***Verdict and Answers Consistent.*** When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers. **(3)** ***Answers Inconsistent with the Verdict.*** When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may: **(A)** approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict; **(B)** direct the jury to further consider its answers and verdict; or **(C)** order a new trial. **(4)** ***Answers Inconsistent with Each Other and the Verdict.*** When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings	Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling
(a) Judgment as a Matter of Law. **(1)** If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. **(2)** Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.	**(a) Judgment as a Matter of Law.** **(1)** *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: **(A)** resolve the issue against the party; and **(B)** grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. **(2)** *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.
(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may: **(1)** if a verdict was returned: **(A)** allow the judgment to stand, **(B)** order a new trial, or **(C)** direct entry of judgment as a matter of law; or **(2)** if no verdict was returned: **(A)** order a new trial, or **(B)** direct entry of judgment as a matter of law.	**(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may: **(1)** allow judgment on the verdict, if the jury returned a verdict; **(2)** order a new trial; or **(3)** direct the entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion. **(1)** If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. **(2)** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.	**(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.** **(1)** *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial. **(2)** *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders. **(d) Time for a Losing Party's New-Trial Motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.
(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.	**(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.** If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(e) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this caution.

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error	Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error
(a) Requests. **(1)** A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. **(2)** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and **(B)** with the court's permission file untimely requests for instructions on any issue.	**(a) Requests.** **(1)** ***Before or at the Close of the Evidence.*** At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give. **(2)** ***After the Close of the Evidence.*** After the close of the evidence, a party may: **(A)** file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and **(B)** with the court's permission, file untimely requests for instructions on any issue.
(b) Instructions. The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time after trial begins and before the jury is discharged.	**(b) Instructions.** The court: **(1)** must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; **(2)** must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and **(3)** may instruct the jury at any time before the jury is discharged.
(c) Objections. **(1)** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. **(2)** An objection is timely if: **(A)** a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or **(B)** a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.	**(c) Objections.** **(1)** ***How to Make.*** A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection. **(2)** ***When to Make.*** An objection is timely if: **(A)** a party objects at the opportunity provided under Rule 51(b)(2); or **(B)** a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error. **(1)** A party may assign as error: **(A)** an error in an instruction actually given if that party made a proper objection under Rule 51(c), or **(B)** a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c). **(2)** A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).	**(d) Assigning Error; Plain Error.** **(1)** ***Assigning Error.*** A party may assign as error: **(A)** an error in an instruction actually given, if that party properly objected; or **(B)** a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected. **(2)** ***Plain Error.*** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52. Findings by the Court; Judgment on Partial Findings	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.	**(a) Findings and Conclusions.** **(1)** ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58. **(2)** ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action. **(3)** ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion. **(4)** ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings. **(5)** ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings. **(6)** ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.
(b) Amendment. On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.	**(b) Amended or Additional Findings.** On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.
(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.	**(c) Judgment on Partial Findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions "except as provided in subdivision (c) of this rule." Amended Rule 52(a)(3) says that findings are unnecessary "unless these rules provide otherwise." This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings "made in actions tried without a jury," provided that the sufficiency of the evidence might be "later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended Rule 52(c) refers only to "judgment," to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c).

Rule 53. Masters	Rule 53. Masters
(a) Appointment. **(1)** Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties consented to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by **(i)** some exceptional condition, or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.	**(a) Appointment.** **(1)** ***Scope.*** Unless a statute provides otherwise, a court may appoint a master only to: **(A)** perform duties consented to by the parties; **(B)** hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by: **(i)** some exceptional condition; or **(ii)** the need to perform an accounting or resolve a difficult computation of damages; or **(C)** address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.
(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification. **(3)** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.	**(2)** ***Disqualification.*** A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification. **(3)** ***Possible Expense or Delay.*** In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master. **(1) Notice.** The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment. **(2) Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c); **(B)** the circumstances — if any — in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). **(3) Entry of Order.** The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification. **(4) Amendment.** The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.	**(b) Order Appointing a Master.** **(1)** ***Notice.*** Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment. **(2)** ***Contents.*** The appointing order must direct the master to proceed with all reasonable diligence and must state: **(A)** the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c); **(B)** the circumstances, if any, in which the master may communicate ex parte with the court or a party; **(C)** the nature of the materials to be preserved and filed as the record of the master's activities; **(D)** the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and **(E)** the basis, terms, and procedure for fixing the master's compensation under Rule 53(g). **(3)** ***Issuing.*** The court may issue the order only after: **(A)** the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and **(B)** if a ground is disclosed, the parties, with the court's approval, waive the disqualification. **(4)** ***Amending.*** The order may be amended at any time after notice to the parties and an opportunity to be heard.
(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.	**(c) Master's Authority.** **(1)** ***In General.*** Unless the appointing order directs otherwise, a master may: **(A)** regulate all proceedings; **(B)** take all appropriate measures to perform the assigned duties fairly and efficiently; and **(C)** if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence. **(2)** ***Sanctions.*** The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.
(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.	

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.	**(d) Master's Orders.** A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.
(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.	**(e) Master's Reports.** A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.
(g) Action on Master's Order, Report, or Recommendations. **(1) Action.** In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions. **(2) Time To Object or Move.** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time. **(3) Fact Findings.** The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that: **(A)** the master's findings will be reviewed for clear error, or **(B)** the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final. **(4) Legal Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5) Procedural Matters.** Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.	**(f) Action on the Master's Order, Report, or Recommendations.** **(1)** ***Opportunity for a Hearing; Action in General.*** In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions. **(2)** ***Time to Object or Move to Adopt or Modify.*** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time. **(3)** ***Reviewing Factual Findings.*** The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that: **(A)** the findings will be reviewed for clear error; or **(B)** the findings of a master appointed under Rule 53 (a)(1)(A) or (C) will be final. **(4)** ***Reviewing Legal Conclusions.*** The court must decide de novo all objections to conclusions of law made or recommended by a master. **(5)** ***Reviewing Procedural Matters.*** Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation. **(1) Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard. **(2) Payment.** The compensation fixed under Rule 53(h)(1) must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3) Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.	**(g) Compensation.** **(1)** ***Fixing Compensation.*** Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard. **(2)** ***Payment.*** The compensation must be paid either: **(A)** by a party or parties; or **(B)** from a fund or subject matter of the action within the court's control. **(3)** ***Allocating Payment.*** The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.
(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.	**(h) Appointing a Magistrate Judge.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VII. JUDGMENT Rule 54. Judgments; Costs	TITLE VII. JUDGMENT Rule 54. Judgment; Costs
(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.	**(a) Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.	**(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.
(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.	**(c) Demand for Judgment; Relief to Be Granted.** A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorneys' Fees. **(1) Costs Other than Attorneys' Fees.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. **(2) Attorneys' Fees.** **(A)** Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial. **(B)** Unless otherwise provided by statute or order of the court, the motion must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.	**(d) Costs; Attorney's Fees.** **(1)** ***Costs Other Than Attorney's Fees.*** Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action. **(2)** ***Attorney's Fees.*** **(A)** *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. **(B)** *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must: **(i)** be filed no later than 14 days after the entry of judgment; **(ii)** specify the judgment and the statute, rule, or other grounds entitling the movant to the award; **(iii)** state the amount sought or provide a fair estimate of it; and **(iv)** disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a). **(D)** By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of Rule 53(a)(1) and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter. **(E)** The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U.S.C. § 1927.	**(C)** *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a). **(D)** *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter. **(E)** *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

COMMITTEE NOTE

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 54(b) required two steps to enter final judgment as to fewer than all claims among all parties. The court must make an express determination that there is no just reason for delay and also make an express direction for the entry of judgment. Amended Rule 54(b) eliminates the express direction for the entry of judgment. There is no need for an "express direction" when the court expressly determines that there is no just reason for delay and enters a final judgment.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney-fee motions in class actions to which it is addressed.

Rule 55. Default	Rule 55. Default; Default Judgment
(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.	**(a) Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
(b) Judgment. Judgment by default may be entered as follows: **(1) By the Clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person. **(2) By the Court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.	**(b) Entering a Default Judgment.** **(1)** ***By the Clerk.*** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person. **(2)** ***By the Court.*** In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to: **(A)** conduct an accounting; **(B)** determine the amount of damages; **(C)** establish the truth of any allegation by evidence; or **(D)** investigate any other matter.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).	**(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).
(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).	[Current Rule 55(d) is deleted.]
(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.	**(d) Judgment Against the United States.** A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.

Amended Rule 55 omits former Rule 55(d), which included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary. Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Rule 56. Summary Judgment	Rule 56. Summary Judgment
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.	**(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after: **(1)** 20 days have passed from commencement of the action; or **(2)** the opposing party serves a motion for summary judgment.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.	**(b) By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.	**(c) Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.	**(d) Case Not Fully Adjudicated on the Motion.** **(1)** ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action. **(2)** ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.	**(e) Affidavits; Further Testimony.** **(1)** ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits. **(2)** ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.	**(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: **(1)** deny the motion; **(2)** order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or **(3)** issue any other just order.
(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.	**(g) Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment — that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

Rule 57. Declaratory Judgments	Rule 57. Declaratory Judgment
The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.	These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Entry of Judgment	Rule 58. Entering Judgment
(a) Separate Document. **(1)** Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion: **(A)** for judgment under Rule 50(b); **(B)** to amend or make additional findings of fact under Rule 52(b); **(C)** for attorney fees under Rule 54; **(D)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(E)** for relief under Rule 60.	**(a) Separate Document.** Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion: **(1)** for judgment under Rule 50(b); **(2)** to amend or make additional findings under Rule 52(b); **(3)** for attorney's fees under Rule 54; **(4)** for a new trial, or to alter or amend the judgment, under Rule 59; or **(5)** for relief under Rule 60.
(2) Subject to Rule 54(b): **(A)** unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(i)** the jury returns a general verdict, **(ii)** the court awards only costs or a sum certain, or **(iii)** the court denies all relief; **(B)** the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(i)** the jury returns a special verdict or a general verdict accompanied by interrogatories, or **(ii)** the court grants other relief not described in Rule 58(a)(2).	**(b) Entering Judgment.** **(1)** ***Without the Court's Direction.*** Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: **(A)** the jury returns a general verdict; **(B)** the court awards only costs or a sum certain; or **(C)** the court denies all relief. **(2)** ***Court's Approval Required.*** Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: **(A)** the jury returns a special verdict or a general verdict with answers to written questions; or **(B)** the court grants other relief not described in this subdivision (b).

(b) Time of Entry. Judgment is entered for purposes of these rules: **(1)** if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a), and **(2)** if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: **(A)** when it is set forth on a separate document, or **(B)** when 150 days have run from entry in the civil docket under Rule 79(a).	**(c) Time of Entry.** For purposes of these rules, judgment is entered at the following times: **(1)** if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or **(2)** if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs: **(A)** it is set out in a separate document; or **(B)** 150 days have run from the entry in the civil docket.
(c) Cost or Fee Awards. **(1)** Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2). **(2)** When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.	**(d) Request for Entry.** A party may request that judgment be set out in a separate document as required by Rule 58(a).
(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).	**(e) Cost or Fee Awards.** Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 59. New Trials; Amendment of Judgments	Rule 59. New Trial; Altering or Amending a Judgment
(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.	**(a) In General.** (1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. (2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.	**(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 10 days after the entry of judgment.
(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.	**(c) Time to Serve Affidavits.** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.	**(d) New Trial on the Court's Initiative or for Reasons Not in the Motion.** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.
(e) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.	**(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

COMMITTEE NOTE

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 60. Relief From Judgment or Order	Rule 60. Relief from a Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.	**(a) Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.	**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: **(1)** mistake, inadvertence, surprise, or excusable neglect; **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; **(4)** the judgment is void; **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or **(6)** any other reason that justifies relief.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.	**(c) Timing and Effect of the Motion.** **(1)** ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. **(2)** ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.
This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.	**(d) Other Powers to Grant Relief.** This rule does not limit a court's power to: **(1)** entertain an independent action to relieve a party from a judgment, order, or proceeding; **(2)** grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or **(3)** set aside a judgment for fraud on the court.
Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.	**(e) Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

COMMITTEE NOTE

The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 60(b) also said that the procedure for obtaining any relief from a judgment was by motion as prescribed in the Civil Rules or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Civil Rules or by independent action.

Rule 61. Harmless Error	Rule 61. Harmless Error
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.	Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

COMMITTEE NOTE

The language of Rule 61 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 62. Stay of Proceedings To Enforce a Judgment	Rule 62. Stay of Proceedings to Enforce a Judgment
(a) Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.	**(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken: **(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or **(2)** a judgment or order that directs an accounting in an action for patent infringement.
(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).	**(b) Stay Pending the Disposition of a Motion.** On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions: **(1)** under Rule 50, for judgment as a matter of law; **(2)** under Rule 52(b), to amend the findings or for additional findings; **(3)** under Rule 59, for a new trial or to alter or amend a judgment; or **(4)** under Rule 60, for relief from a judgment or order.
(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.	**(c) Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either: **(1)** by that court sitting in open session; or **(2)** by the assent of all its judges, as evidenced by their signatures.
(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.	**(d) Stay with Bond on Appeal.** If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay in Favor of the United States or Agency Thereof. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.	**(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.** The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.
(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.	**(f) Stay in Favor of a Judgment Debtor Under State Law.** If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.
(g) Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.	**(g) Appellate Court's Power Not Limited.** This rule does not limit the power of the appellate court or one of its judges or justices: **(1)** to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or **(2)** to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.
(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.	**(h) Stay with Multiple Claims or Parties.** A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

The language of Rule 62 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

Rule 63. Inability of a Judge To Proceed	Rule 63. Judge's Inability to Proceed
If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.	If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE NOTE

The language of Rule 63 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VIII. PROVISIONAL AND FINAL REMEDIES Rule 64. Seizure of Person or Property	TITLE VIII. PROVISIONAL AND FINAL REMEDIES Rule 64. Seizing a Person or Property
At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules.	**(a) Remedies Under State Law — In General.** At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.
The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.	**(b) Specific Kinds of Remedies.** The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action: • arrest; • attachment; • garnishment; • replevin; • sequestration; and • other corresponding or equivalent remedies.

COMMITTEE NOTE

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action "after it is removed."

Rule 65. Injunctions	Rule 65. Injunctions and Restraining Orders
(a) Preliminary Injunction. **(1) Notice.** No preliminary injunction shall be issued without notice to the adverse party. **(2) Consolidation of Hearing With Trial on Merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.	**(a) Preliminary Injunction.** **(1)** ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party. **(2)** ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.
(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.	**(b) Temporary Restraining Order.** **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.	**(2)** ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	(3) ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order. (4) ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.
(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.	**(c) Security.** The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.	**(d) Contents and Scope of Every Injunction and Restraining Order.** **(1)** ***Contents.*** Every order granting an injunction and every restraining order must: **(A)** state the reasons why it issued; **(B)** state its terms specifically; and **(C)** describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required. **(2)** ***Persons Bound.*** The order binds only the following who receive actual notice of it by personal service or otherwise: **(A)** the parties; **(B)** the parties' officers, agents, servants, employees, and attorneys; and **(C)** other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).
(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.	**(e) Other Laws Not Modified.** These rules do not modify the following: **(1)** any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee; **(2)** 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or **(3)** 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.
(f) Copyright Impoundment. This rule applies to copyright impoundment proceedings.	**(f) Copyright Impoundment.** This rule applies to copyright-impoundment proceedings.

COMMITTEE NOTE

The language of Rule 65 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

Rule 65.1. Security: Proceedings Against Sureties	Rule 65.1. Proceedings Against a Surety
Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.	Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

COMMITTEE NOTE

The language of Rule 65.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 66. Receivers Appointed by Federal Courts	Rule 66. Receivers
An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.	These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

COMMITTEE NOTE

The language of Rule 66 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 67. Deposit in Court	Rule 67. Deposit into Court
In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court.	**(a) Depositing Property.** If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.
Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, § 725v; or any like statute. The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.	**(b) Investing and Withdrawing Funds.** Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

COMMITTEE NOTE

The language of Rule 67 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 68. Offer of Judgment	Rule 68. Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.	**(a) Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment. **(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. **(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability. **(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

COMMITTEE NOTE

The language of Rule 68 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 69. Execution	Rule 69. Execution
(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.	**(a) In General.** **(1)** ***Money Judgment; Applicable Procedure.*** A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies. **(2)** ***Obtaining Discovery.*** In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.
(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.	**(b) Against Certain Public Officers.** When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

COMMITTEE NOTE

The language of Rule 69 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Rule 70. Judgment for Specific Acts; Vesting Title	Rule 70. Enforcing a Judgment for a Specific Act
If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.	**(a) Party's Failure to Act; Ordering Another to Act.** If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party. **(b) Vesting Title.** If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance. **(c) Obtaining a Writ of Attachment or Sequestration.** On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience. **(d) Obtaining a Writ of Execution or Assistance.** On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance. **(e) Holding in Contempt.** The court may also hold the disobedient party in contempt.

COMMITTEE NOTE

The language of Rule 70 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 71. Process in Behalf of and Against Persons Not Parties	Rule 71. Enforcing Relief For or Against a Nonparty
When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.	When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE NOTE

The language of Rule 71 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

IX. SPECIAL PROCEEDINGS Rule 71A. Condemnation of Property	TITLE IX. SPECIAL PROCEEDINGS Rule 71.1. Condemning Real or Personal Property
(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.	**(a) Applicability of Other Rules.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.
(b) Joinder of Properties. The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.	**(b) Joinder of Properties.** The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.
(c) Complaint. **(1) Caption.** The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property. **(2) Contents.** The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners."	**(c) Complaint.** **(1)** ***Caption.*** The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property. **(2)** ***Contents.*** The complaint must contain a short and plain statement of the following: **(A)** the authority for the taking; **(B)** the uses for which the property is to be taken; **(C)** a description sufficient to identify the property; **(D)** the interests to be acquired; and **(E)** for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it. **(3)** ***Parties.*** When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant. **(3) Filing.** In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.	**(4)** ***Procedure.*** Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant. **(5)** ***Filing; Additional Copies.*** In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.
(d) Process. **(1) Notice; Delivery.** Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.	**(d) Process.** **(1)** ***Delivering Notice to the Clerk.*** On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.
(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.	**(2)** ***Contents of the Notice.*** **(A)** *Main Contents.* Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state: **(i)** that the action is to condemn property; **(ii)** the interest to be taken; **(iii)** the authority for the taking; **(iv)** the uses for which the property is to be taken; **(v)** that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and **(vi)** that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation. **(B)** *Conclusion.* The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Service of Notice. **(A) Personal Service.** Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States. **(B) Service by Publication.** Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."	**(3)** ***Serving the Notice.*** **(A)** *Personal Service.* When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4. **(B)** *Service by Publication.* **(i)** A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least three successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."
Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon. **(4) Return; Amendment.** Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.	**(ii)** Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication. **(4)** ***Effect of Delivery and Service.*** Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4. **(5)** ***Proof of Service; Amending the Proof or Notice.*** Rule 4(l) governs proof of service. The court may permit the proof or the notice to be amended.

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.	**(e) Appearance or Answer.** (1) *Notice of Appearance.* A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant. (2) *Answer.* A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must: (A) identify the property in which the defendant claims an interest; (B) state the nature and extent of the interest; and (C) state all the defendant's objections and defenses to the taking. (3) ***Waiver of Other Objections and Defenses; Evidence on Compensation.*** A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.
(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.	**(f) Amending Pleadings.** Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).
(g) Substitution of Parties. If a defendant dies or becomes incompetent or transfers an interest after the defendant's joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.	**(g) Substituting Parties.** If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate.	**(h) Trial of the Issues.** **(1)** ***Issues Other Than Compensation; Compensation.*** In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined: **(A)** by any tribunal specially constituted by a federal statute to determine compensation; or **(B)** if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission. **(2)** ***Appointing a Commission; Commission's Powers and Report.*** **(A)** *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons. **(B)** *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.
If a commission is appointed it shall have the authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.	**(C)** *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate. **(D)** *Commission's Powers and Report.* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of Action. **(1) As of Right.** If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed. **(2) By Stipulation.** Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered. **(3) By Order of the Court.** At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined. **(4) Effect.** Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.	**(i) Dismissal of the Action or a Defendant.** **(1)** ***Dismissing the Action.*** **(A)** ***By the Plaintiff.*** If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property. **(B)** ***By Stipulation.*** Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered. **(C)** ***By Court Order.*** At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken. **(2)** ***Dismissing a Defendant.*** The court may at any time dismiss a defendant who was unnecessarily or improperly joined. **(3)** ***Effect.*** A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.
(j) Deposit and Its Distribution. The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.	**(j) Deposit and Its Distribution.** **(1)** ***Deposit.*** The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute. **(2)** ***Distribution; Adjusting Distribution.*** After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.	**(k) Condemnation Under a State's Power of Eminent Domain.** This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.
(l) Costs. Costs are not subject to Rule 54(d).	**(l) Costs.** Costs are not subject to Rule 54(d).

COMMITTEE NOTE

The language of Rule 71A has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 71A has been redesignated as Rule 71.1 to conform to the designations used for all other rules added within the original numbering system.

Rule 72. Magistrate Judges; Pretrial Orders	Rule 72. Magistrate Judges: Pretrial Order
(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.	**(a) Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.
(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties. A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.	**(b) Dispositive Motions and Prisoner Petitions.** (1) ***Findings and Recommendations.*** A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party. (2) ***Objections.*** Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. (3) ***Resolving Objections.*** The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

COMMITTEE NOTE

The language of Rule 72 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 73. Magistrate Judges; Trial by Consent and Appeal Options	Rule 73. Magistrate Judges: Trial by Consent; Appeal
(a) Powers; Procedure. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(5).	**(a) Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or nonjury trial. A record must be made in accordance with 28 U.S.C. § 636(c)(5).
(b) Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election. A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge. The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.	**(b) Consent Procedure.** **(1)** ***In General.*** When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral. **(2)** ***Reminding the Parties About Consenting.*** A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences. **(3)** ***Vacating a Referral.*** On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.
(c) Appeal. In accordance with Title 28, U.S.C. § 636(c)(3), appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.	**(c) Appealing a Judgment.** In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.
(d) [Abrogated.]	

COMMITTEE NOTE

The language of Rule 73 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 74. [Abrogated.]	Rule 74.

COMMITTEE NOTE

Rule 74 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 75. [Abrogated.]	Rule 75.

COMMITTEE NOTE

Rule 75 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 76. [Abrogated.]	Rule 76.

COMMITTEE NOTE

Rule 76 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

X. DISTRICT COURTS AND CLERKS Rule 77. District Courts and Clerks	TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment
(a) **District Courts Always Open.** The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.	(a) **When Court Is Open.** Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.
(b) **Trials and Hearings; Orders in Chambers.** All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.	(b) **Place for Trial and Other Proceedings.** Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.	**(c) Clerk's Office Hours; Clerk's Orders.** **(1)** ***Hours.*** The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A). **(2)** ***Orders.*** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may: **(A)** issue process; **(B)** enter a default; **(C)** enter a default judgment under Rule 55(b)(1); and **(D)** act on any other matter that does not require the court's action.
(d) Notice of Orders or Judgments. — Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.	**(d) Serving Notice of an Order or Judgment.** **(1)** ***Service.*** Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b). **(2)** ***Time to Appeal Not Affected by Lack of Notice.*** Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

COMMITTEE NOTE

The language of Rule 77 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 78. Motion Day	Rule 78. Hearing Motions; Advancing an Action
Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.	**(a) Providing a Regular Schedule for Oral Hearings; Other Orders.** A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action. **(b) Providing for Submission on Briefs.** By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

COMMITTEE NOTE

The language of Rule 78 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 79. Books and Records Kept by the Clerk and Entries Therein	Rule 79. Records Kept by the Clerk
(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.	**(a) Civil Docket.** (1) ***In General.*** The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made. (2) ***Items to be Entered.*** The following items must be marked with the file number and entered chronologically in the docket: **(A)** papers filed with the clerk; **(B)** process issued, and proofs of service or other returns showing execution; and **(C)** appearances, orders, verdicts, and judgments. (3) ***Contents of Entries; Jury Trial Demanded.*** Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.	**(b) Civil Judgments and Orders.** The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.
(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."	**(c) Indexes; Calendars.** Under the court's direction, the clerk must: **(1)** keep indexes of the docket and of the judgments and orders described in Rule 79(b); and **(2)** prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.
(d) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.	**(d) Other Records.** The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

COMMITTEE NOTE

The language of Rule 79 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence	Rule 80. Stenographic Transcript as Evidence
(a) [Abrogated.] **(b) [Abrogated.]** **(c) Stenographic Report or Transcript as Evidence.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.	If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

COMMITTEE NOTE

The language of Rule 80 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

XI. GENERAL PROVISIONS Rule 81. Applicability in General	TITLE XI. GENERAL PROVISIONS Rule 81. Applicability of the Rules in General; Removed Actions
(a) Proceedings to Which the Rules Apply. **(1)** These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-7681. They do apply to proceedings in bankruptcy to the extent provided by the Federal Rules of Bankruptcy Procedure. **(2)** These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.	**(a) Applicability to Particular Proceedings.** **(1)** ***Prize Proceedings.*** These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681. **(2)** ***Bankruptcy.*** These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure. **(3)** ***Citizenship.*** These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates. **(4)** ***Special Writs.*** These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings: **(A)** is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and **(B)** has previously conformed to the practice in civil actions.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings. **(4)** These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.	**(5)** ***Proceedings Involving a Subpoena.*** These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings. **(6)** ***Other Proceedings.*** These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: **(A)** 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture; **(B)** 9 U.S.C., relating to arbitration; **(C)** 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior; **(D)** 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance; **(E)** 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board; **(F)** 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and **(G)** 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.
(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable. **(6)** These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, ch. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect. **(7) [Abrogated.]**	

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.	**(b) Scire Facias and Mandamus.** The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.
(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.	**(c) Removed Actions.** **(1)** ***Applicability.*** These rules apply to a civil action after it is removed from a state court.
Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition.	**(2)** ***Further Pleading.*** After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods: **(A)** 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief; **(B)** 20 days after being served with the summons for an initial pleading on file at the time of service; or **(C)** 5 days after the notice of removal is filed.
A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.	**(3)** ***Demand for a Jury Trial.*** **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial. **(B)** *Under Rule 38.* If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after: **(i)** it files a notice of removal; or **(ii)** it is served with a notice of removal filed by another party.

(d) [Abrogated.] **(e)** Law Applicable. Whenever in these rules the law of the state which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.	**(d) Law Applicable.** **(1)** ***State Law.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions. **(2)** ***District of Columbia.*** The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia: **(A)** the law applied in the District governs; and **(B)** the term "federal statute" includes any Act of Congress that applies locally to the District.
(f) References to Officer of the United States. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.	[Current Rule 81(f) is deleted.]

COMMITTEE NOTE

The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal.

Former Rule 81(e), drafted before the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), defined state law to include "the statutes of that state and the state judicial decisions construing them." The *Erie* decision reinterpreted the Rules of Decision Act, now 28 U.S.C. § 1652, recognizing that the "laws" of the states include the common law established by judicial decisions. Long-established practice reflects this understanding, looking to state common law as well as statutes and court rules when a Civil Rule directs use of state law. Amended Rule 81(d)(1) adheres to this practice, including all state judicial decisions, not only those that construe state statutes.

Former Rule 81(f) is deleted. The office of district director of internal revenue was abolished by restructuring under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, July 22, 1998, 26 U.S.C. § 1 Note.

Rule 82. Jurisdiction and Venue Unaffected	Rule 82. Jurisdiction and Venue Unaffected
These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391–1392.	These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

COMMITTEE NOTE

The language of Rule 82 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 83. Rules by District Courts; Judge's Directives	Rule 83. Rules by District Courts; Judge's Directives
(a) Local Rules. **(1)** Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. **(2)** A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.	**(a) Local Rules.** **(1)** ***In General.*** After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. **(2)** ***Requirement of Form.*** A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.
(b) Procedures When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.	**(b) Procedure When There Is No Controlling Law.** A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The language of Rule 83 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 84. Forms; Technical Amendments	Rule 84. Forms
The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.	The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

COMMITTEE NOTE

The language of Rule 84 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 85. Title	Rule 85. Title
These rules may be known and cited as the Federal Rules of Civil Procedure.	These rules may be cited as the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The language of Rule 85 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 86. Effective Date	Rule 86. Effective Dates
(a) These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.	**(a) In General.** These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern: **(1)** proceedings in an action commenced after their effective date; and **(2)** proceedings after that date in an action then pending unless: **(A)** the Supreme Court specifies otherwise; or **(B)** the court determines that applying them in a particular action would be infeasible or work an injustice.
(b) Effective Date of Amendments. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	**(b) December 1, 2007 Amendments.** If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.
(c) Effective Date of Amendments. The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.	
(d) Effective Date of Amendments. The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	

(e) Effective Date of Amendments. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.	

COMMITTEE NOTE

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.

12-C

Style-Substance Rules

"Style-Substance" Rules 4, 9, 11, 14, 16, 26, 30, 31, 40, 71.1, and 78 are recommended for approval for adoption as follows:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE SEPARATE FROM STYLE REVISION PROJECT

Rule 4. Summons

* * * * *

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

* * * * *

(C) when authorized by a federal statute.

* * * * *

COMMITTEE NOTE

The former provision describing service on interpleader claimants is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty or Maritime Claim.

* * * * *

(2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

* * * * *

COMMITTEE NOTE

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Rule 14. Third-Party Practice

* * * * *

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

* * * * *

COMMITTEE NOTE

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

* * * * *

COMMITTEE NOTE

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

* * * * *

COMMITTEE NOTE

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

* * * * *

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

COMMITTEE NOTE

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of Completion or Filing.

(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

(2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

COMMITTEE NOTE

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served.

* * * * *

COMMITTEE NOTE

Rule 71.1(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

The information that identifies the attorney is changed to include telephone number and electronic-mail address, in line with similar amendments to Rules 11(a) and 26(g)(1).

Rule 78. Hearing Motions; Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings. A court may establish regular times and places for oral hearings on motions.

* * * * *

COMMITTEE NOTE

Rule 16 has superseded any need for the provision in former Rule 78 for orders for the advancement, conduct, and hearing of actions.

12-D

Style Forms

Style Forms 1-82 are recommended for approval for adoption as follows:

PROPOSED STYLE FORM

Form 1. Caption. *(Use on every summons, complaint, answer, motion, or other document.)*

United States District Court
for the
_____District of _____

A B, Plaintiff	)	
	)	
v.	)	
	)	**Civil Action No. _____**
C D, Defendant	)	
	)	
v.	)	
	)	
E F, Third-Party Defendant	)	
(*Use if needed.*)	)	

(Name of Document)

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.
(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Form 3. Summons.

(Caption – See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney,_____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date _____

_____
Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Form 4. Summons on a Third-Party Complaint.

(Caption – See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____, whose address is, _____, and also on the plaintiff's attorney, _____, whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date _____

_____
Clerk of Court

(Court Seal)

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

(Caption – See Form 1.)

To (*name the defendant – or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign – See Form 2.)

Form 6. Waiver of the Service of Summons.

(Caption – See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign – See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Form 7. Statement of Jurisdiction.

a. (*For diversity-of-citizenship jurisdiction.*) The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

b. (*For federal-question jurisdiction.*) This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, ___U.S.C. § ___].

c. (*For a claim in the admiralty or maritime jurisdiction.*) This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

Form 8. Statement of Reasons for Omitting a Party.
(If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

Form 9. Statement Noting a Party's Death.

(Caption – See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign – See Form 2.)

Form 10. Complaint to Recover a Sum Certain.

(Caption – See Form 1.)

1. (Statement of Jurisdiction -- See Form 7.)

(*Use one or more of the following as appropriate and include a demand for judgment.*)

(a) On a Promissory Note

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $ _____ with interest at the rate of __ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $ _____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $ _____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $ _____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

(f) For Money Had and Received

2. The defendant owes the plaintiff $ _____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 11. Complaint for Negligence.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On _*date*_, at _*place*_, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2).

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against one or both defendants for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, and costs.

(Date and sign – See Form 2.)

Form 14. Complaint for Damages Under the Merchant Marine Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $ _____ a month and found, which is equal to a shore worker's wage of $ _____ a month.

4. On *date*, the vessel was at sea on the return voyage. (*Describe the weather and the condition of the vessel.*)

5. (*Describe as in Form 11 the defendant's negligent conduct.*)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign — See Form 2.)

Form 15. Complaint for the Conversion of Property.

(Caption — See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On _*date*_, at _*place*_, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of _*describe*_.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 16. Third-Party Complaint.

(Caption – See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. (*State grounds entitling defendant's name to recover from third-party defendant's name for (all or an identified share) of any judgment for plaintiff's name against defendant's name.*)

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign – See Form 2.)

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A][summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) the defendant be required to specifically perform the agreement and pay damages of $ _____, plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 18. Complaint for Patent Infringement.

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On ___*date*___, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells, and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

(Date and sign – See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

(Date and sign – See Form 2.)

Form 20. Complaint for Interpleader and Declaratory Relief.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) the plaintiff recover its costs.

(Date and sign – See Form 2.)

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $ _____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $ _____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and ~~that~~ any judgment granted be made a lien on the property.

(Date and sign – See Form 2.)

Form 30. Answer Presenting Defenses Under Rule 12(b).

(Caption – See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense – Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than ____ years before this action was commenced.

Counterclaim

7. (*Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

Crossclaim

8. (*Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

(Date and sign — See Form 2.)

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

(Caption – See Form 1.)

Response to the Allegations in the Complaint
(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from _name_ a deposit of $ _____.

2. The plaintiff demands payment of the deposit because of a purported assignment from _name_, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) _name_ be made a party to this action;

(b) the plaintiff and _name_ be required to interplead their respective claims;

(c) the court decide whether the plaintiff or _name_ or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover ~~its~~ costs and attorney's fees.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

(Caption – See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign – See Form 2.)

Form 41. Motion to Bring in a Third-Party Defendant.

(Caption – See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 42. Motion to Intervene as a Defendant Under Rule 24.

(Caption – See Form 1.)

1. ___*name*___ moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b).*)

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign – See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

PROPOSED STYLE FORM

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption – See Form 1.)

The plaintiff _name_ requests that the defendant _name_ respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy — and to test or sample — the following tangible things:

(*Describe each thing, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(*Describe the property and each object or operation.*)

(*State the time and manner of the inspection and any related acts.*)

(Date and sign – See Form 2.)

Form 51. Request for Admissions Under Rule 36.

(Caption — See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document.*)

2. The truth of each of the following statements:

(*List each statement.*)

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 52. Report of the Parties' Planning Meeting.

(Caption – See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)
(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)
(d) (Maximum number of requests for admission, along with the dates responses are due.)
(e) (Maximum number of depositions by each party.)
(f) (Limits on the length of depositions, in hours.)
(g) (Dates for exchanging reports of expert witnesses.)
(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)
(b) (Requested dates for pretrial conferences.)
(c) (Final dates for the plaintiff to amend pleadings or to join parties.)
(d) (Final dates for the defendant to amend pleadings or to join parties.)
(e) (Final dates to file dispositive motions.)
(f) (State the prospects for settlement.)
(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)
(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)
(i) (Final dates to file objections under Rule 26(a)(3).)
(j) (Suggested trial date and estimate of trial length.)
(k) (Other matters.)

(Date and sign — see Form 2.)

Form 60. Notice of Condemnation.

(Caption – See Form 1.)

To *name the defendant* .

1. A complaint in condemnation has been filed in the United States District Court for the _____District of _____, to take property to use for *purpose* . The interest to be taken is *describe* . The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(*Describe the property.*)

3. The authority for taking this property is *cite* .

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign – See Form 2.)

Form 61. Complaint for Condemnation.

(Caption – See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction – See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is (*describe in enough detail for identification — or attach the description and state "is described in Exhibit A, attached."*)

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. (*For each person include the interest claimed.*)

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign – See Form 2.)

Form 70. Judgment on a Jury Verdict.

(Caption – See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____ with interest at the rate of __%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant __*name* recover costs from the plaintiff __*name* .]

Date _____

_____
Clerk of Court

Form 71. Judgment by the Court without a Jury.

(Caption – See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____, with prejudgment interest at the rate of ___%, postjudgment interest at the rate of ___%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff __*name*__.]

Date_____

_____
Clerk of Court

Form 80. Notice of a Magistrate Judge's Availability.

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

PROPOSED STYLE FORM

Form 81. Consent to an Assignment to a Magistrate Judge.

(Caption – See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk — not to a judge or magistrate judge.)

Date_____

_____
Signature of the Party

Form 82. Order of Assignment to a Magistrate Judge.

(Caption – See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date _____

_____
United States District Judge

12-E

Style Amendments to the Electronic Discovery Amendments

Style amendments to Rules 16, 26, 33, 34, 37, and 45 are recommended for approval for adoption as follows:

Rule 16. Pretrial Conferences; Scheduling; Management[1]	Rule 16. Pretrial Conferences; Scheduling; Management
* * * * * **(b) Scheduling and Planning.** Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time	* * * * * **(b) Scheduling.**
(1) to join other parties and to amend the pleadings; **(2)** to file motions; and **(3)** to complete discovery. The scheduling order also may include **(4)** modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted; **(5)** provisions for disclosure or discovery of electronically stored information; **(6)** any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production; **(7)** the date or dates for conferences before trial, a final pretrial conference, and trial; and **(8)** any other matters appropriate in the circumstances of the case. * * * * *	**(3) Contents of the Order.** **(A)** ***Required Contents.*** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions. **(B)** ***Permitted Contents.*** The scheduling order may: **(i)** modify the timing of disclosures under Rules 26(a) and 26(e)(1); **(ii)** modify the extent of discovery; **(iii)** provide for disclosure or discovery of electronically stored information; **(iv)** include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced; **(v)** set dates for pretrial conferences and for trial; and **(vi)** include other appropriate matters. * * * * *

[1] Includes amendments that take effect on December 1, 2006.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure	Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) Required Disclosures; Methods to Discover Additional Matter.	**(a) Required Disclosures.**
(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:	**(1) Initial Disclosure.** **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;	**(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment; * * * * *	**(ii)** a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; * * * * *
(b) Discovery Scope and Limits. * * * * *	**(b) Discovery Scope and Limits.** * * * * *
(2) Limitations.	**(2) Limitations on Frequency and Extent.**

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.	**(A)** ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.
(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.	**(B)** ***Specific Limitations on Electronically Stored Information.*** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.
(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: * * * * *	**(C)** ***When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: * * * * *
(5) Claims of Privilege or Protection of Trial- Preparation Materials.	**(5) Claiming Privilege or Protecting Trial-Preparation Materials.**
(A) ***Information Withheld.*** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.	**(A)** ***Information Withheld.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: **(i)** expressly make the claim; and **(ii)** describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) ***Information Produced.*** If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. * * * * *	**(B)** ***Information Produced.*** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. * * * * *
(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:	**(f) Conference of the Parties; Planning for Discovery.** * * * * * **(2) Conference Content; Parties' Responsibilities.** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made; **(2)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues; **(3)** any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; **(4)** any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order; **(5)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(6)** any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c). * * * * *	**(3) Discovery Plan.** A discovery plan must state the parties' views and proposals on: **(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made; **(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; **(C)** any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; **(D)** any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order; **(E)** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and **(F)** any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c). * * * * *

Rule 33. Interrogatories to Parties	Rule 33. Interrogatories to Parties
* * * * * **(d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory . . . * * * * *	* * * * * **(d) Option to Produce Business Records.** If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: * * * * *

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes	Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).	**(a) In General.** A party may serve on any other party a request within the scope of Rule 26(b): **(1)** to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: **(A)** any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or **(B)** any designated tangible things; or **(2)** to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).	**(b) Procedure.** **(1) Contents of the Request.** The request: **(A)** must describe with reasonable particularity each item or category of items to be inspected; **(B)** must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and **(C)** may specify the form or forms in which electronically stored information is to be produced.

* * * * * The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.	**(2) Responses and Objections.** * * * * * **(D)** ***Responding to a Request for Production of Electronically Stored Information.*** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.
Unless the parties otherwise agree, or the court otherwise orders: **(i)** a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; **(ii)** if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and **(iii)** a party need not produce the same electronically stored information in more than one form. * * * * *	**(E)** ***Producing the Documents or Electronically Stored Information.*** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information: **(i)** A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; **(ii)** If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and **(iii)**A party need not produce the same electronically stored information in more than one form. * * * * *

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions	**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**
* * * * * **(f) Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. * * * * *	* * * * * **(e) Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.
	(f) Failure to Participate in Framing a Discovery Plan. * * * * *

Rule 45. Subpoena	Rule 45. Subpoena
(a) Form; Issuance. **(1)** Every subpoena shall **(A)** state the name of the court from which it is issued; and **(B)** state the title of the action, the name of the court in which it is pending, and its civil action number; and **(C)** command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and **(D)** set forth the text of subdivisions (c) and (d) of this rule.	**(a) In General.** **(1) Form and Contents.** **(A)** ***Requirements – In General.*** Every subpoena must: **(i)** state the court from which it issued; **(ii)** state the title of the action, the court in which it is pending, and its civil-action number; **(iii)** command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and **(iv)** set out the text of Rule 45(c) and (d). * * * * *
A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.	**(C)** ***Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.*** A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.
	(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) A subpoena must issue as follows: * * * * *	**(2) Issued from Which Court.** A subpoena must issue as follows: * * * * *
(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.	**(C)** for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

THE RULES AS PUBLISHED

Style Rules 1-86 are set out in full below, showing changes since publication in the conventional overstrike and underline form.

Changes have also been made since publication in "Style-Substance" Rules 11, 26, 30(b)(6), 31, 71.1, and 78. These changes, and the retraction of the proposals to amend Rules 8 and 36, are shown in the same form.

Changes have been made since publication in Style Forms 2, 5, 6, 17, 18, 19, 20, 30, 31, 51, and 71. These changes are shown in the same form.

The style changes to Rules 16, 26, 33, 34, 37, and 45 are shown in the same form.

AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This change does not affect ~~the~~ such questions as whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are avoided. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the

reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

4. Rule Numbers

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. Other Changes

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

Rule 2. One Form of Action

There is one form of action — the civil action.

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an Action

A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4. Summons

(a) Contents; Amendments.

(1) Contents. ~~The~~ A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments. The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint ~~has been~~ was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in ~~Official~~ Form ~~1A~~ 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if sent to the defendant outside any judicial district of the United States — to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent — or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States. To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity. To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time. The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State. A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued;

(C) who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or

(D) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required. Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States. Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law. The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law. On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(C) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Serving Other Process

(a) In General. Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Service: When Required.

(1) In General. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing Property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim~~, or appearance~~ must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) Serving an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address — in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person's ~~address is unknown~~ has no known address;

(E) sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) Using Court Facilities. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Serving Numerous Defendants.

(1) In General. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying Parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) Required Filings; Certificate of Service. Any paper after the complaint that is required to be served — together with a certificate of service — must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) How Filing Is Made — In General. A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) Electronic Filing, Signing, or Verification. A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require ~~filing by~~ electronic ~~means~~ filing only if reasonable exceptions are allowed. A paper filed ~~by electronic means~~ electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and ~~neither~~ the parties do not include the United States, ~~nor any~~ one of its agencies, or one of its officers~~,~~ or employees ~~is a party~~ in an official capacity~~,~~ ;or

(B) a state statute is questioned and ~~neither~~ the parties do not include the state, ~~nor any~~ one of its agencies, or one of its officers~~,~~ or employees ~~is a party~~ in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is ~~challenged~~ questioned — or on the state attorney general if a state statute is ~~challenged~~ questioned — either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate ~~A~~attorney ~~G~~general ~~of the United States~~ that ~~there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute~~ a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice ~~of constitutional question~~ is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:

(1) Day of the Event Excluded. Exclude the day of the act, event, or default that begins the period.

(2) Exclusions from Brief Periods. Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(3) Last Day. Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) "Legal Holiday" Defined. As used in these rules, "legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different ~~period~~ time; or

(C) when a court order — which a party may, for good cause, apply for ex parte — sets a different ~~period~~ time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party ~~must or~~ may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer ~~or a third-party answer~~.

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the

motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency, the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement

(a) Who Must File; Contents. A nongovernmental corporate party must file two copies of a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(b) Time to File; Supplemental Filing. A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief ~~—whether an original claim, a counterclaim, a crossclaim, or a third-party claim—~~must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials — Responding to the Substance. A denial must fairly respond to the substance of the allegation.

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking Knowledge or Information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) Effect of Failing to Deny. An allegation — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) Mistaken Designation. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

(2) Alternative Statements of a Claim or Defense. A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) Inconsistent Claims or Defenses. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) How Designated. If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ <u>or</u> Maritime Claims <u>and Asset Forfeiture Actions</u>. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(2) Amending a Designation. Rule 15 governs amending a pleading to add or withdraw a designation.

(3) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading must have a caption with the court's name, a title ~~that names the parties~~, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings ~~may name~~, after naming the first party on each side ~~and~~, may refer generally to other parties.

(b) Paragraphs; Separate Statements. A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.

(c) Adoption by Reference; ~~Attached Instrument~~ Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument ~~attached~~ that is an exhibit to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if

the party is ~~not represented by an attorney~~ unrepresented. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information ~~or belief~~.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an Order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; ~~and~~ Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 20 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order ~~that it considers appropriate~~.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

(g) Joining Motions ~~Consolidating Defenses in a Motion~~.

(1) Right to Join ~~Consolidating Defenses~~. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be

stylistic only.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Crossclaim

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process ~~by which the court did not acquire~~ that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory ~~against an opposing party~~.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) Omitted Counterclaim. The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint — the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(~~b~~ a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(2) Other Amendments. ~~Except as allowed by Rule 15(a)(1)~~ In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) ~~During~~ Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) ~~After Trial~~ For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment ~~May~~ Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint ~~and within~~ or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) set dates for pretrial conferences and for trial; and

(iv) include other appropriate matters.

(4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify ~~an~~ the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate — or does not participate in good faith — in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses — including attorney's fees — incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

COMMITTEE NOTE

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE IV. PARTIES

Rule 17. ~~The~~ Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) Without a Representative. A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

COMMITTEE NOTE

The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Rule 18. Joinder of Claims

(a) In General. A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) Joinder of Contingent Claims. A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

COMMITTEE NOTE

The language of Rule 18 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Modification of the obscure former reference to a claim "heretofore cognizable only after another claim has been prosecuted to a conclusion" avoids any uncertainty whether Rule 18(b)'s meaning is fixed by retrospective inquiry from some particular date.

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join

as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

COMMITTEE NOTE

The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

COMMITTEE NOTE

The language of Rule 20 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

COMMITTEE NOTE

The language of Rule 21 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 22. Interpleader

(a) Grounds.

(1) By a Plaintiff. Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) By a Defendant. A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) Relation to Other Rules and Statutes. This rule supplements — and does not limit — the joinder of parties allowed by Rule 20. The remedy ~~it~~ this rule provides is in addition to — and does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

COMMITTEE NOTE

The language of Rule 22 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact ~~are~~ common to the class;

(3) the claims or defenses of the representative parties' ~~claims or defenses~~ are typical of the ~~class~~ claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the ~~Class~~ Action.

(1) In General. In conducting ~~a class~~ an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to ~~inform the court~~ signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended ~~as desirable~~ from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal~~ed settlement, voluntary dismissal, or compromise~~.

(2) If the proposal would bind class members, ~~T~~the court may approve ~~a settlement, voluntary dismissal, or compromise that would bind class members~~ it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal~~ed settlement, voluntary dismissal, or compromise~~.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to ~~a proposed settlement, voluntary dismissal, or compromise that~~ the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

COMMITTEE NOTE

The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Rule 23.1. Derivative Actions

(a) Prerequisites. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(b) Pleading Requirements. The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

COMMITTEE NOTE

The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

COMMITTEE NOTE

The language of Rule 23.2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent ~~the movant's~~ that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Procedure.

(1) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(2) Challenge to a Statute; Court's Duty. When the constitutionality of a statute affecting the public interest is questioned in any action, the court must, as provided in 28 U.S.C. § 2403, notify:

(A) the Attorney General of the United States, if a federal statute is challenged and neither the United States nor any of its officers, agencies, or employees is a party; and

(B) the Attorney General of the state, if a state statute is challenged and neither the state nor any of its officers, agencies, or employees is a party.

(3) Party's Responsibility. A party challenging the constitutionality of a statute should call the court's attention to its duty under Rule 24(c)(2), but failing to do so does not waive any constitutional right otherwise timely asserted.

COMMITTEE NOTE

The language of Rule 24 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former rule stated that the same procedure is followed when a United States statute gives a right to intervene. This statement is deleted because it added nothing.

Rule 25. Substitution of Parties

(a) Death.

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent ~~may~~ must be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(d) Public Officers; Death or Separation from Office.

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

COMMITTEE NOTE

The language of Rule 25 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.

TITLE V. DISCLOSURES AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to

support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to a proceeding in another court; and

(viii) an action to enforce an arbitration award.

(C) Time for Initial Disclosures — In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures — For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the ~~witness's~~ compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds

for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

[Current Rule 26(a)(5) is deleted]

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(B).

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) When Required. The court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(C) On Motion or the Court's Own Initiative. The court may act on motion or on its own after reasonable notice.

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing ~~required under Rule 26(b)(3)(A)~~, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another

party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a) — or who has responded to an interrogatory, request for production, or request for admission — must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable — and in any event at least 21 days before a scheduling conference is <u>to be</u> held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(D) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation ~~costs~~; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. ~~The court must strike~~ Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless ~~the omission~~ a signature is promptly ~~corrected~~ supplied after ~~being~~ the omission is called to the attorney's or party's attention. ~~Until the signature is provided, the other party has no duty to respond.~~

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served ~~only~~ as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at

the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Rule 27. Depositions to Perpetuate Testimony

(a) Before an Action Is Filed.

(1) Petition. A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) Notice and Service. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) Order and Examination. If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(4) Using the Deposition. A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, although not so taken, would be admissible in evidence in the courts of the state where it was taken.

(b) Pending Appeal.

(1) In General. The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(2) Motion. The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(3) Court Order. If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(c) Perpetuation by an Action. This rule does not limit a court's power to entertain an action to perpetuate testimony.

COMMITTEE NOTE

The language of Rule 27 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 28. Persons Before Whom Depositions May Be Taken

(a) Within the United States.

(1) In General. Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer." The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request — Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

COMMITTEE NOTE

The language of Rule 28 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 29. Stipulations About Discovery Procedure

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified — in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified — but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

COMMITTEE NOTE

The language of Rule 29 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general

description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request ~~complying with~~ under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition that was taken nonstenographically.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through ~~camera or sound~~-recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed ~~for a fair examination of~~ to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction. The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 31. Depositions by Written Questions

(a) When a Deposition May Be Taken.

(1) Without Leave. A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(3) Service; Required Notice. A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if

known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) Questions Directed to an Organization. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(5) Questions from Other Parties. Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(b) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(c) Notice of Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The language of Rule 31 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

(5) Limitations on Use.

(A) Deposition Taken on Short Notice. A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B)

requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) Unavailable Deponent; Party Could Not Obtain an Attorney. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition. If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action. A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice. An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification. An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(C) Objection to a Written Question. An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.

(4) To Completing and Returning the Deposition. An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the ~~defect~~ error or irregularity becomes known or, with reasonable diligence, could have been known.

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 32(a) applied "[a]t the trial or upon the hearing of a motion or an interlocutory proceeding." The amended rule describes the same events as "a hearing or trial."

Rule 33. Interrogatories to Parties

(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) Responding Party. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) Time to Respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

COMMITTEE NOTE

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect and copy the following items in the responding party's possession, custody, or control:

(A) any designated documents — including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained either directly or after the responding party translates them into a reasonably usable form; or

(B) any tangible things — and to test or sample these things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request must:

(A) describe with reasonable particularity each item or category of items to be inspected; and

(B) specify a reasonable time, place, and manner for the inspection and for performing the related acts.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Producing the Documents. A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

COMMITTEE NOTE

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 35. Physical and Mental Examinations

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition — including blood group — is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(2) Motion and Notice; Contents of the Order. The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report.

(1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request — and is entitled to receive — from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all examinations of the same condition.

(5) Failure to Deliver a Report. The court on motion may order — on just terms — that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(6) Scope. This subdivision (b) applies also to an examination made by the parties' ~~stipulation~~ agreement, unless the ~~stipulation~~ agreement states

otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 36. Requests for Admission

(a) Scope and Procedure.

(1) Scope. A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(2) Form; Copy of a Document. Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(4) Answer. If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of ~~information or~~ knowledge <u>or information</u> as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) Objections. The grounds for objecting to a request must be stated.

~~**(6) Matter Presenting a Trial Issue.**~~ A party must not object ~~to a request~~ solely on the ground that ~~it~~ the request presents a genuine issue for trial. ~~The party may deny the matter or state why it cannot admit or deny.~~

(~~7~~ 6) Motion Regarding the Sufficiency of an Answer or Objection. The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16~~(d) and~~ (e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

COMMITTEE NOTE

The language of Rule 36 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of the first paragraph of former Rule 36(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference. The redundant reminder of Rule 37(c) in the second paragraph was likewise omitted.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) In General. On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) Specific Motions.

(A) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.

(C) Related to a Deposition. When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) Sanctions in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) For Not Producing a Person for Examination. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to ~~Amend~~ Supplement an Earlier Response, or to Admit.

(1) Failure to Disclose or ~~Amend~~ Supplement. If a party fails to ~~disclose the~~ provide information ~~required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) —~~ or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use ~~as~~ that information or witness to supply evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) Failure to Admit. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) Motion; Grounds for Sanctions. The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) Certification. A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) Unacceptable Excuse for Failing to Act. A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) Types of Sanctions. Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity

to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

COMMITTEE NOTE

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VI. TRIALS

Rule 38. Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution — or as provided by a federal statute — is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand — which may be included in a pleading — no later than 10 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may — within 10 days after being served with the demand or within a shorter time ordered by the court — serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim ~~designated as~~ <u>that is</u> an admiralty or maritime claim under Rule 9(h).

COMMITTEE NOTE

The language of Rule 38 has been amended as part of the general restyling of

the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(b) When No Demand Is Made. Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(c) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

COMMITTEE NOTE

The language of Rule 39 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials without request — or on a party's request with notice to the other parties. The court must give priority to actions entitled to priority by a federal statute.

COMMITTEE NOTE

The language of Rule 40 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state- court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule — except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 — operates as an adjudication on the merits.

(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

COMMITTEE NOTE

The language of Rule 41 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

When Rule 23 was amended in 1966, Rules 23.1 and 23.2 were separated from Rule 23. Rule 41(a)(1) was not then amended to reflect the Rule 23 changes. In 1968 Rule 41(a)(1) was amended to correct the cross-reference to what had become Rule 23(e), but Rules 23.1 and 23.2 were inadvertently overlooked. Rules 23.1 and 23.2 are now added to the list of exceptions in Rule 41(a)(1)(A). This change does not affect established meaning. Rule 23.2 explicitly incorporates Rule 23(e), and thus was already absorbed directly into the exceptions in Rule 41(a)(1). Rule 23.1 requires court approval of a compromise or dismissal in language parallel to Rule 23(e) and thus supersedes the apparent right to dismiss by notice of dismissal.

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; ~~and~~ or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

COMMITTEE NOTE

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause ~~I~~in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

COMMITTEE NOTE

The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44. Proving an Official Record

(a) Means of Proving.

(1) Domestic Record. Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(2) Foreign Record.

(A) In General. Each of the following evidences a foreign official record — or an entry in it — that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record — or a copy — that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(B) Final Certification of Genuineness. A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(C) Other Means of Proof. If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(b) Lack of a Record. A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(c) Other Proof. A party may prove an official record — or an entry or lack of an entry in it — by any other method authorized by law.

COMMITTEE NOTE

The language of Rule 44 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 44.1. Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

COMMITTEE NOTE

The language of Rule 44.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements – In General. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce and permit the inspection and copying of designated documents or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) Command to Attend a Deposition — Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(~~B~~ C) Command to Produce Materials or Permit Inspection. A command to produce documents or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney~~, as an officer of the court,~~ also may issue and sign a subpoena ~~from~~ as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce ~~designated~~ documents or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce ~~designated materials~~ documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting or copying any or all of the ~~designated~~ materials or to inspecting the premises. The objection must be served before the earlier of the time specified for

compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production, inspection, or copying.

(ii) Inspection and copying may be ~~done~~ required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying

a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(2) Claiming Privilege or Protection. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(A) expressly ~~assert~~ make the claim; and

(B) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

COMMITTEE NOTE

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on

an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Rule 46. Objecting to a Ruling or Order

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

COMMITTEE NOTE

The language of Rule 46 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 47. Selecting Jurors

(a) Examining Jurors. The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(b) Peremptory Challenges. The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excusing a Juror. During trial or deliberation, the court may excuse a juror for good cause.

COMMITTEE NOTE

The language of Rule 47 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 48. Number of Jurors; Verdict

A jury must initially have at least ~~no fewer than~~ 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

COMMITTEE NOTE

The language of Rule 48 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 49. Special Verdict; General Verdict and Questions

(a) Special Verdict.

(1) In General. The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) Instructions. The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) Issues Not Submitted. A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict with Answers to Written Questions.

(1) In General. The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must

decide. The court must ~~instruct the jury to enable it~~ give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) Verdict and Answers Consistent. When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) Answers Inconsistent with the Verdict. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) Answers Inconsistent with Each Other and the Verdict. When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

COMMITTEE NOTE

The language of Rule 49 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

COMMITTEE NOTE

The language of Rule 50 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 50(b) stated that the court reserves ruling on a motion for judgment as a matter of law made at the close of all the evidence "[i]f, for any reason, the court does not grant" the motion. The words "for any reason" reflected the proposition that the reservation is automatic and inescapable. The ruling is reserved even if the court explicitly denies the motion. The same result follows under the amended rule. If the motion is not granted, the ruling is reserved.

Amended Rule 50(e) identifies the appellate court's authority to direct the entry of judgment. This authority was not described in former Rule 50(d), but was recognized in *Weisgram v. Marley Co.*, 528 U.S. 440 (2000), and in *Neely v. Martin K. Eby Construction Company*, 386 U.S. 317 (1967). When Rule 50(d) was drafted in 1963, the Committee Note stated that "[s]ubdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied * * *." Express recognition of the authority to direct entry of judgment does not otherwise supersede this.

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to ~~a proposed~~ an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and — unless the court rejected the request in a definitive ruling on the record — also properly objected.

(2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

COMMITTEE NOTE

The language of Rule 51 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52. Findings and Conclusions ~~in a Nonjury Proceeding~~ by the Court; Judgment on Partial Findings

(a) Findings and Conclusions ~~by the Court~~.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Setting Aside the Findings. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

COMMITTEE NOTE

The language of Rule 52 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 52(a) said that findings are unnecessary on decisions of motions "except as provided in subdivision (c) of this rule." Amended Rule 52(a)(3) says that findings are unnecessary "unless these rules provide otherwise." This change reflects provisions in other rules that require Rule 52 findings on deciding motions. Rules 23(e), 23(h), and 54(d)(2)(C) are examples.

Amended Rule 52(a)(5) includes provisions that appeared in former Rule 52(a) and 52(b). Rule 52(a) provided that requests for findings are not necessary for purposes of review. It applied both in an action tried on the facts without a jury and also in granting or refusing an interlocutory injunction. Rule 52(b), applicable to findings "made in actions tried without a jury," provided that the sufficiency of the evidence might be "later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings." Former Rule 52(b) did not explicitly apply to decisions granting or refusing an interlocutory injunction. Amended Rule 52(a)(5) makes explicit the application of this part of former Rule 52(b) to interlocutory injunction decisions.

Former Rule 52(c) provided for judgment on partial findings, and referred to it as "judgment as a matter of law." Amended Rule 52(c) refers only to "judgment," to avoid any confusion with a Rule 50 judgment as a matter of law in a jury case. The standards that govern judgment as a matter of law in a jury case have no bearing on a decision under Rule 52(c).

Rule 53. Masters

(a) Appointment.

(1) Scope. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(2) Disqualification. A master must not have a relationship to the parties, attorneys, action, or court that would require disqualification of a judge under 28 U.S.C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(3) Possible Expense or Delay. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing a Master.

(1) Notice. Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(2) Contents. The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(3) Issuing. The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(4) Amending. The order may be amended at any time after notice to the parties and an opportunity to be heard.

(c) Master's Authority.

(1) In General. Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions. The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Master's Orders. A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(e) Master's Reports. A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(f) Action on the Master's Order, Report, or Recommendations.

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an

opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53 (a)(1)(A) or (C) will be final.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Reviewing Procedural Matters. Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(g) Compensation.

(1) Fixing Compensation. Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(2) Payment. The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) Allocating Payment. The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

COMMITTEE NOTE

The language of Rule 53 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VII. JUDGMENT

Rule 54. Judgment; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment ~~must~~ should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim —or when multiple parties are involved, the court may ~~enter~~ direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the ~~court enters~~ entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

COMMITTEE NOTE

The language of Rule 54 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 54(b) required two steps to enter final judgment as to fewer than all claims among all parties. The court must make an express determination that there is no just reason for delay and also make an express direction for the

entry of judgment. Amended Rule 54(b) eliminates the express direction for the entry of judgment. There is no need for an "express direction" when the court expressly determines that there is no just reason for delay and enters a final judgment.

The words "or class member" have been removed from Rule 54(d)(2)(C) because Rule 23(h)(2) now addresses objections by class members to attorney-fee motions. Rule 54(d)(2)(C) is amended to recognize that Rule 23(h) now controls those aspects of attorney-fee motions in class actions to which it is addressed.

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment.

(1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk — on the plaintiff's request, with an affidavit showing the amount due — must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) By the Court. In all other cases, the party must apply <u>to the court</u> for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals — preserving any federal statutory right to a jury trial — when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) Setting Aside a Default or a Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(d) Judgment Against the United States. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

COMMITTEE NOTE

The language of Rule 55 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 55(a) directed the clerk to enter a default when a party failed to plead or otherwise defend "as provided by these rules." The implication from the reference to defending "as provided by these rules" seemed to be that the clerk should enter a default even if a party did something showing an intent to defend, but that act was not specifically described by the rules. Courts in fact have rejected that implication. Acts that show an intent to defend have frequently prevented a default even though not connected to any particular rule. "[A]s provided by these rules" is deleted to reflect Rule 55(a)'s actual meaning.

Amended Rule 55 omits former Rule 55(d), which included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary. Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days <u>have passed</u> from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show

that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts. If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

COMMITTEE NOTE

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment — that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

Rule 57. Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. ~~A party may~~ Rules 38 and 39 govern a demand for a jury trial ~~under~~

~~Rules 38 and 39~~. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

COMMITTEE NOTE

The language of Rule 57 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings ~~of fact~~ under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(b) Entering Judgment.

(1) Without the Court's Direction. Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(2) Court's Approval Required. Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(b) Time of Entry. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) Request for Entry. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

COMMITTEE NOTE

The language of Rule 58 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; ~~and~~ or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

COMMITTEE NOTE

The language of Rule 59 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, ~~or~~ Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who ~~is~~ <u>was</u> not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) <u>Bills and</u> Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

COMMITTEE NOTE

The language of Rule 60 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 60(b) also said that the procedure for obtaining any relief from a judgment was by motion as prescribed in the Civil Rules or by an independent action. That provision is deleted as unnecessary. Relief continues to be available only as provided in the Civil Rules or by independent action.

Rule 61. Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

COMMITTEE NOTE

The language of Rule 61 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not ~~automatically~~ stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. ~~After an appeal is taken~~ While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may~~,~~ obtain a stay by supersedeas bond, ~~obtain a stay,~~ except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under ~~state~~ the law of the state where the court ~~sits~~ is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:

(1) to stay proceedings~~;~~

~~(2)~~ — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

~~(3~~ 2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMITTEE NOTE

The language of Rule 62 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 62(a) referred to Rule 62(c). It is deleted as an unnecessary. Rule 62(c) governs of its own force.

Rule 63. Judge's Inability to Proceed

If ~~the~~ a judge ~~who commenced~~ conducting a hearing or trial is unable to proceed, any other judge may proceed ~~with it~~ upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

COMMITTEE NOTE

The language of Rule 63 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizing a Person or Property

(a) Remedies Under State Law — In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

COMMITTEE NOTE

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action "after it is removed."

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning ~~a~~ <u>the</u> hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without <u>written or oral</u> notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 10 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice — or on shorter notice set by the court — the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. ~~If t~~The court may issue~~s~~ a preliminary injunction or a temporary restraining order~~, the court must require~~ only if the movant ~~to~~ give~~s~~ security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) Contents. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail — and not by referring to the complaint or other document — the act or acts restrained or required.

(2) Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

COMMITTEE NOTE

The language of Rule 65 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

Rule 65.1. Proceedings Against a Surety

Whenever these rules (including the Supplemental Rules for ~~Certain~~ Admiralty ~~and~~ or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

COMMITTEE NOTE

The language of Rule 65.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 66. Receivers

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must ~~administer an estate according to~~ accord with the historical practice in federal courts or ~~as provided in~~ with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

COMMITTEE NOTE

The language of Rule 66 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 67. Deposit into Court

(a) Depositing Property. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party — on notice to every other party and by leave of court — may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) Investing and Withdrawing Funds. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042

and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

COMMITTEE NOTE

The language of Rule 67 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. ~~At least~~ More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

COMMITTEE NOTE

The language of Rule 68 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 69. Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court ~~orders~~ directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must ~~follow~~ accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.

(b) Against Certain Public Officers. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. § 2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. § 118, the judgment must be satisfied as those statutes provide.

COMMITTEE NOTE

The language of Rule 69 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Rule 70. Enforcing a Judgment for a Specific Act

(a) Party's Failure to Act; Ordering Another to Act. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) Vesting Title. If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) Obtaining a Writ of Attachment or Sequestration. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) Obtaining a Writ of Execution or Assistance. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) Holding in Contempt. The court may also hold the disobedient party in contempt.

COMMITTEE NOTE

The language of Rule 70 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 71. Enforcing Relief For or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE NOTE

The language of Rule 71 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE IX. SPECIAL PROCEEDINGS

Rule 71.1. Condemning Real or Personal Property

(a) Applicability of Other Rules. These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) Joinder of Properties. The plaintiff may join separate pieces of property in a single action, no matter ~~who owns them or whether they are~~ whether they are owned by the same persons or sought for the same use.

(c) Complaint.

(1) Caption. The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property — designated generally by kind, quantity, and location — and at least one owner of some part of or interest in the property.

(2) Contents. The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) Parties. When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) Procedure. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of ~~the~~ a deposit that the facts warrant.

(5) Filing; Additional Copies. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) Process.

(1) Delivering Notice to the Clerk. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the

property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice; and

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation.

(B) Conclusion. The notice must conclude with the name of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) Serving the Notice.

(A) Personal Service. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) Service by Publication.

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice — once a week for at least three successive weeks — in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) Effect of Delivery and Service. Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) Proof of Service; Amending the Proof or Notice. Rule 4(l) governs proof of service. The court may permit the proof or the notice to be amended.

(e) Appearance or Answer.

(1) Notice of Appearance. A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) Answer. A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) Waiver of Other Objections and Defenses; Evidence on Compensation. A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant — whether or not it has previously appeared or answered — may present evidence on the amount of compensation to be paid and may share in the award.

(f) Amending Pleadings. Without leave of court, the plaintiff may — as often as it wants — amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) Substituting Parties. If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) Trial of the Issues.

(1) Issues Other Than Compensation; Compensation. In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) Appointing a Commission; Commission's Powers and Report.

(A) Reasons for Appointing. If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) Alternate Commissioners. The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) Examining the Prospective Commissioners. Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to ~~the appointment of~~ a <u>prospective</u> commissioner or alternate.

(D) Commission's Powers and Report. A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) Dismissal of the Action <u>or a Defendant</u>.

(1) Dismissing the Action.

(~~1~~ A) By the Plaintiff. If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(~~2~~ B) By Stipulation. Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(~~3~~ C) By Court Order. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) Dismissing a Defendant. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(~~4~~ 3) Effect. A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) Deposit and Its Distribution.

(1) Deposit. The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) Distribution; Adjusting Distribution. After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) Condemnation Under a State's Power of Eminent Domain. This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury — or for trying the issue of compensation by jury or commission or both — that law governs.

(l) Costs. Costs are not subject to Rule 54(d).

COMMITTEE NOTE

The language of Rule 71A has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 71A has been redesignated as Rule 71.1 to conform to the designations used for all other rules added within the original numbering system.

Rule 72. Magistrate Judges: Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(2) Objections. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The

district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

COMMITTEE NOTE

The language of Rule 72 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 73. Magistrate Judges: Trial by Consent; Appeal

(a) Trial by Consent. When authorized under 28 U.S.C. § 636(c), a magistrate judge may, if all parties consent, conduct ~~the proceedings in~~ a civil action or proceeding, including a jury or nonjury trial. A record ~~of the proceedings~~ must be made in accordance with 28 U.S.C. § 636(c)(5).

(b) Consent Procedure.

(1) In General. When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) Reminding the Parties About Consenting. A district judge, magistrate judge, or other court official may ~~again advise~~ remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(3) Vacating a Referral. On its own for good cause — or when a party shows extraordinary circumstances — the district judge may vacate a referral to a magistrate judge under this rule.

(c) Appealing a Judgment. In accordance with 28 U.S.C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

COMMITTEE NOTE

The language of Rule 73 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and

terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 74.

COMMITTEE NOTE

Rule 74 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use

Rule 75.

COMMITTEE NOTE

Rule 75 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

Rule 76.

COMMITTEE NOTE

Rule 76 was abrogated in 1997 to reflect repeal of the statute providing for appeal from a magistrate judge's judgment to the district court. The rule number is reserved for possible future use.

TITLE X. DISTRICT COURTS AND CLERKS: CONDUCTING BUSINESS; ISSUING ORDERS

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

(a) When Court Is Open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for Trial and Other Proceedings. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.

(c) Clerk's Office Hours; Clerk's Orders.

(1) Hours. The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

(2) Orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(d) Serving Notice of an Order or Judgment.

(1) Service. Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(2) Time to Appeal Not Affected by Lack of Notice. Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

COMMITTEE NOTE

The language of Rule 77 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 78. Hearing Motions; Advancing an Action

(a) Providing a Regular Schedule for Oral Hearings; Other Orders. A court may establish regular times and places for oral hearings on motions. But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.

(b) Providing for Submission on Briefs. By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

COMMITTEE NOTE

The language of Rule 78 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 79. Records Kept by the Clerk

(a) Civil Docket.

(1) In General. The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(2) Items to be Entered. The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(3) Contents of Entries; Jury Trial Demanded. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(b) Civil Judgments and Orders. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(c) Indexes; Calendars. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(d) Other Records. The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

COMMITTEE NOTE

The language of Rule 79 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 80. Stenographic Transcript as Evidence

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who ~~recorded~~ reported it.

COMMITTEE NOTE

The language of Rule 80 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

~~Former Rule 80(c) was limited to testimony "stenographically reported." It is revised to reflect the use of other methods of recording testimony at a trial or hearing.~~

TITLE XI. GENERAL PROVISIONS

Rule 81. Applicability of the Rules in General; Removed Actions

(a) Applicability to Particular Proceedings.

(1) Prize Proceedings. These rules do not apply to prize proceedings in admiralty governed by 10 U.S.C. §§ 7651–7681.

(2) Bankruptcy. These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(3) Citizenship. These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal

statutes and has previously conformed to the practice in civil actions. The provisions of 8 U.S.C. § 1451 for service by publication and for answer apply in proceedings to cancel citizenship certificates.

(4) Special Writs. These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(5) Proceedings Involving a Subpoena. These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(6) Other Proceedings. These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

(B) 9 U.S.C., relating to arbitration;

(C) 15 U.S.C. § 522, for reviewing an order of the Secretary of the Interior;

(D) 15 U.S.C. § 715d(c), for reviewing an order denying a certificate of clearance;

(E) 29 U.S.C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;

(F) 33 U.S.C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) 45 U.S.C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

(2) Further Pleading. After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 20 days after receiving — through service or otherwise — a copy of the initial pleading stating the claim for relief;

(B) 20 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 5 days after the notice of removal is filed.

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(d) Law Applicable.

(1) State Law. When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) District of Columbia. The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia:

(A) the law applied in the District governs; and

(B) the term "federal statute" includes any Act of Congress that applies locally to the District.

COMMITTEE NOTE

The language of Rule 81 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 81(c) has been revised to reflect the amendment of 28 U.S.C. § 1446(a) that changed the procedure for removal from a petition for removal to a notice of removal.

Former Rule 81(e), drafted before the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), defined state law to include "the statutes of that state and the state judicial decisions construing them." The *Erie* decision reinterpreted the Rules of Decision Act, now 28 U.S.C. § 1652, recognizing that the "laws" of the states include the common law established by judicial decisions. Long-established practice reflects this understanding, looking to state common law as well as statutes and court rules when a Civil Rule directs use of state law. Amended Rule 81(d)(1) adheres to this practice, including all state judicial decisions, not only those that construe state statutes.

Former Rule 81(f) is deleted. The office of district director of internal revenue was abolished by restructuring under the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, July 22, 1998, 26 U.S.C. § 1 Note.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392.

COMMITTEE NOTE

The language of Rule 82 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 83. Rules by District Courts; Judge's Directives

(a) Local Rules.

(1) In General. After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) Requirement of Form. A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

The language of Rule 83 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 84. Forms

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

COMMITTEE NOTE

The language of Rule 84 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 85. Title

These rules may be cited as the Federal Rules of Civil Procedure.

COMMITTEE NOTE

The language of Rule 85 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 86. Effective Dates

(a) In General. These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U.S.C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) ~~in the district court's opinion,~~ the court determines that applying them in a particular action would be infeasible or work an injustice.

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

COMMITTEE NOTE

The language of Rule 86 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The subdivisions that provided an incomplete list of the effective dates of the original Civil Rules and amendments made up to 1963 are deleted as no longer useful.

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by

looking to the date the specific conflicting rule provision first became effective.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE SEPARATE FROM STYLE REVISION PROJECT

Rule 4. Summons

* * * * *

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

* * * * *

~~**(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or~~

(~~D~~ C) when authorized by a federal statute.

* * * * *

COMMITTEE NOTE

The former provision describing service on interpleader claimants is deleted as redundant in light of the general provision in (k)(1)(C) recognizing personal jurisdiction authorized by a federal statute.

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty or Maritime Claim.

* * * * *

~~**(2) Amending a Designation.** Rule 15 governs amending a pleading to add or withdraw a designation.~~

(~~3~~ 2) Designation for Appeal. A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

Rule 15 governs pleading amendments of its own force. The former redundant statement that Rule 15 governs an amendment that adds or

withdraws a Rule 9(h) designation as an admiralty or maritime claim is deleted. The elimination of paragraph (2) means that "(3)" will be redesignated as "(2)" in Style Rule 9(h).

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address, ~~electronic~~ mail address, and telephone number~~, if any~~. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

* * * * *

COMMITTEE NOTE

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

Rule 14. Third-Party Practice

* * * * *

(b) When a Plaintiff May Bring in a Third Party. When a ~~counterclaim~~ claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

* * * * *

COMMITTEE NOTE

A plaintiff should be on equal footing with the defendant in making third-party claims, whether the claim against the plaintiff is asserted as a counterclaim or as another form of claim. The limit imposed by the former reference to "counterclaim" is deleted.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by ~~telephone~~ other means to consider possible settlement.

* * * * *

COMMITTEE NOTE

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — or by the party personally, if unrepresented — and must state the signer's address, e-mail address, and telephone number~~, and electronic mail address~~. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

* * * * *

COMMITTEE NOTE

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal

address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition ~~that was taken nonstenographically~~.

* * * * *

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, ~~or~~ a governmental agency, or other entity and describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

COMMITTEE NOTE

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Rule 31. Depositions by Written Questions

* * * * *

(c) Notice of Completion or Filing.

(1) Completion. The party who noticed the deposition must notify all other parties when it is completed.

(2) Filing. A party who files the deposition must promptly notify all other parties of the filing.

COMMITTEE NOTE

The party who noticed a deposition on written questions must notify all other parties when the deposition is completed, so that they may make use of the deposition. A deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Rule 30(e)(1).

Rule 40. Scheduling Cases for Trial

Each court must provide by rule for scheduling trials ~~without request – or on a party's request with notice to the other parties~~. The court must give priority to actions entitled to priority by a federal statute.

COMMITTEE NOTE

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is not useful to limit or dictate the provisions of local rules.

Rule 71.1. Condemning Real or Personal Property

* * * * *

(d) Process.

* * * * *

(2) Contents of the Notice.

(A) Main Contents. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) Conclusion. The notice must conclude with the name, telephone number, and e~~lectronic~~-mail address of the plaintiff's attorney, and an address within the district in which the action is brought where the attorney may be served.

* * * * *

COMMITTEE NOTE

Rule 71.1(e) allows a defendant to appear without answering. Form 28 includes information about this right in the Rule 71.1(d)(2) notice. It is useful to confirm this practice in the rule.

The information that identifies the attorney is changed to include telephone number and electronic-mail address, in line with similar amendments to Rules 11(a) and 26(g)(1).

7

Rule 78. Hearing Motions; ~~*Advancing an Action*~~ Submission on Briefs

(a) Providing a Regular Schedule for Oral Hearings~~; Other Orders~~. A court may establish regular times and places for oral hearings on motions. ~~But at any time or place, on notice that the judge considers reasonable, the judge may issue an order to advance, conduct, and hear an action.~~

* * * * *

COMMITTEE NOTE

Rule 16 has superseded any need for the provision in former Rule 78 for orders for the advancement, conduct, and hearing of actions.

PROPOSED STYLE FORM

Form 1. Caption. *(Use on every summons, complaint, answer, motion, or other document.)*

United States District Court
for the
_____District of _____

A B, Plaintiff	)	
	)	
v.	)	
	)	**Civil Action No. _____**
C D, Defendant	)	
	)	
v.	)	
	)	
E F, Third-Party Defendant	)	
(*Use if needed.*)	)	

(Name of Document)

PROPOSED STYLE FORM

Form 2. Date, Signature, Address, E-mail Address, and Telephone Number.
(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____

_____
(Signature of the attorney
or unrepresented party)

_____
(Printed name)

_____
~~(E-mail address)~~

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

Form 3. Summons.

(Caption – See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney,_____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date _____

_____
Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

PROPOSED STYLE FORM

Form 4. Summons on a Third-Party Complaint.

(Caption – See Form 1.)

To *name the third-party defendant:*

A lawsuit has been filed against defendant _____, who as third-party plaintiff is making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____ , whose address is, _____ , and also on the plaintiff's attorney, ,
whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may – but are not required to – respond to it.

Date _____

_____
Clerk of Court

(Court Seal)

PROPOSED STYLE FORM

Form 5. Notice of a Lawsuit and Request to Waive Service of a Summons.

(Caption – See Form 1.)

To (*name the defendant – or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*):

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid ~~costs~~ expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these ~~costs~~ expenses, you must return the signed waiver within (*give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange ~~for formal service~~ to have the summons and complaint served on you. A~~a~~nd I will ask the court to require you, or the entity you represent, to pay the ~~costs~~ expenses of making service.

Please read the enclosed statement about the duty to ~~waive formal service~~ avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign – See Form 2.)

Form 6. Waiver of the Service of Summons.

(Caption – See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the ~~cost~~ expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign – See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary ~~Costs~~ Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary ~~costs~~ expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the ~~costs~~ expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Form 7. Statement of Jurisdiction.

a. (*For diversity-of-citizenship jurisdiction.*) The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

b. (*For federal-question jurisdiction.*) This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, ___U.S.C. § ___].

c. (*For a claim in the admiralty or maritime jurisdiction.*) This is a case of admiralty or maritime jurisdiction. *(To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

Form 8. Statement of Reasons for Omitting a Party.
(If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

Form 9. Statement Noting a Party's Death.

(Caption – See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign – See Form 2.)

Form 10. Complaint to Recover a Sum Certain.

(Caption – See Form 1.)

1. (Statement of Jurisdiction -- See Form 7.)

(*Use one or more of the following as appropriate and include a demand for judgment.*)

(a) On a Promissory Note

2. On __*date*__, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $ _____ with interest at the rate of __ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $ _____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $ _____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $ _____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b).*

(f) For Money Had and Received

2. The defendant owes the plaintiff $ _____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus interest and costs.

(Date and sign – See Form 2.)

Form 11. Complaint for Negligence.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2).

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against one or both defendants for $ _____, plus costs.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, and costs.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 14. Complaint for Damages Under the Merchant Marine Act.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $ _____ a month and found, which is equal to a shore worker's wage of $ _____ a month.

4. On *date*, the vessel was at sea on the return voyage. (*Describe the weather and the condition of the vessel.*)

5. (*Describe as in Form 11 the defendant's negligent conduct.*)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $ _____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign — See Form 2.)

PROPOSED STYLE FORM

Form 15. Complaint for the Conversion of Property.

(Caption — See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On _*date*_, at _*place*_, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of _*describe*_.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $ _____, plus costs.

(Date and sign – See Form 2.)

Form 16. Third-Party Complaint.

(Caption – See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. (*State grounds entitling defendant's name to recover from third-party defendant's name for (all or an identified share) of any judgment for plaintiff's name against defendant's name.*)

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 17. Complaint for Specific Performance of a Contract to Convey Land.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A][summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $ _____, plus interest and costs, or

(b) ~~that~~ if specific performance is not ordered, the defendant be required to pay damages of $ _____, plus interest and costs~~, if specific performance is not ordered~~.

(Date and sign – See Form 2.)

Form 18. Complaint for Patent Infringement.

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On ___*date*___, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells~~,~~ and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

(Date and sign – See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled_____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book ~~by continuing to publish and sell the infringing book in violation of the copyright~~, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) ~~that~~ until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) ~~that~~ the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) ~~that~~ the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) ~~that~~ the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) ~~that~~ the plaintiff be awarded any other just relief.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 20. Complaint for Interpleader and Declaratory Relief.

(Caption – See Form 1.)

1. (Statement of Jurisdiction – See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) ~~that~~ each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) ~~that~~ the plaintiff recover its costs.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b).

(Caption – See Form 1.)

1. (Statement of Jurisdiction — See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $ _____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $ _____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and ~~that~~ any judgment granted be made a lien on the property.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 30. Answer Presenting Defenses Under Rule 12(b).

(Caption – See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense – Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced.

Counterclaim

7. (*Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

Crossclaim

8. (*Set forth ~~the~~ a crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.*)

(Date and sign — See Form 2.)

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader.

(Caption – See Form 1.)

Response to the Allegations in the Complaint
(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from _*name*_ a deposit of $ _____.

2. The plaintiff demands payment of the deposit because of a purported assignment from _*name*_, who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) _*name*_ be made a party to this action;

(b) the plaintiff and _*name*_ be required to interplead their respective claims;

(c) the court decide whether the plaintiff or _*name*_ or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover ~~its~~ costs and attorney's fees.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim.

(Caption – See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U.S.C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 41. Motion to Bring in a Third-Party Defendant.

(Caption – See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 42. Motion to Intervene as a Defendant Under Rule 24.

(Caption – See Form 1.)

1. ___*name*___ moves for leave to intervene as a defendant in this action and to file the attached answer.

(*State grounds under Rule 24(a) or (b).*)

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign – See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34.

(Caption – See Form 1.)

The plaintiff _name_ requests that the defendant _name_ respond within ____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(*Describe each document and the electronically stored information, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

2. To produce and permit the plaintiff to inspect and copy — and to test or sample — the following tangible things:

(*Describe each thing, either individually or by category.*)

(*State the time, place, and manner of the inspection and any related acts.*)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(*Describe the property and each object or operation.*)

(*State the time and manner of the inspection and any related acts.*)

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 51. Request for Admissions Under Rule 36.

(Caption — See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(*List each document.*)

2. The truth of each of the following statements:

(*List each statement.*)

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 52. Report of the Parties' Planning Meeting.

(Caption – See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring* :

(*e.g., name* representing the plaintiff.)

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:

(*Use separate paragraphs or subparagraphs if the parties disagree.*)

(a) Discovery will be needed on these subjects: (*describe.*)
(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)
(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)
(d) (Maximum number of requests for admission, along with the dates responses are due.)
(e) (Maximum number of depositions by each party.)
(f) (Limits on the length of depositions, in hours.)
(g) (Dates for exchanging reports of expert witnesses.)
(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)
(b) (Requested dates for pretrial conferences.)
(c) (Final dates for the plaintiff to amend pleadings or to join parties.)
(d) (Final dates for the defendant to amend pleadings or to join parties.)
(e) (Final dates to file dispositive motions.)
(f) (State the prospects for settlement.)
(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)
(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)
(i) (Final dates to file objections under Rule 26(a)(3).)
(j) (Suggested trial date and estimate of trial length.)
(k) (Other matters.)

(Date and sign — see Form 2.)

PROPOSED STYLE FORM

Form 60. Notice of Condemnation.

(Caption – See Form 1.)

To *name the defendant* .

1. A complaint in condemnation has been filed in the United States District Court for the _____District of _____, to take property to use for *purpose* . The interest to be taken is *describe* . The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(*Describe the property.*)

3. The authority for taking this property is *cite* .

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice][from (insert the date of the last publication of notice)]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign – See Form 2.)

Form 61. Complaint for Condemnation.

(Caption – See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction – See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is (*describe in enough detail for identification — or attach the description and state "is described in Exhibit A, attached."*)

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. (*For each person include the interest claimed.*)

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign – See Form 2.)

PROPOSED STYLE FORM

Form 70. Judgment on a Jury Verdict.

(Caption – See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____ with interest at the rate of __%, along with costs.]

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant __*name* recover costs from the plaintiff __*name*.]

Date _____

_____
Clerk of Court

Form 71. Judgment by the Court without a Jury.

(Caption – See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that [the plaintiff __*name*__ recover from the defendant __*name*__ the amount of $_____, with prejudgment interest at the rate of ___%, postjudgment interest at the rate of ____%, along with costs.] [the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff __*name*__.]

Date_____

_____
Clerk of Court

Form 80. Notice of a Magistrate Judge's Availability.

1. A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

PROPOSED STYLE FORM

Form 81. Consent to an Assignment to a Magistrate Judge.

(Caption – See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk — not to a judge or magistrate judge.)

Date_____

_____
Signature of the Party

PROPOSED STYLE FORM

Form 82. Order of Assignment to a Magistrate Judge.

(Caption – See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U.S.C. § 636(c).

Date _____

_____
United States District Judge

THE RESTYLED E-DISCOVERY AMENDMENTS

Attached is the package of proposed amendments to Style Rules 16, 26, 33, 34, 37, and 45 to account for the e-discovery amendments to the current Civil Rules that are expected to take effect in December 2006.

The attached document sets out proposed amendments to the Style Rules circulated for public comment in February 2005.

The changes to be made in the February 2005 Style Rules by the Conference-approved e-discovery amendments are shown by single-underlinings and single-strikethroughs. The changes to be made in the e-discovery amendments as part of the current restyling process are shown by double-underlinings and double-strikethroughs.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

* * * * *

(3) Contents of the Order.

(A) ***Required Contents.*** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) ***Permitted Contents.*** The scheduling order ~~also~~ may ~~include~~:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) ~~provisions~~ provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after ~~production~~ information is produced;

(~~iii~~ v) set dates for pretrial conferences and for trial; and

(~~iv~~ vi) include other appropriate matters.

* * * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) ***In General.*** Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, ~~data compilations~~ electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials

bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(2) Limitations on Frequency and Extent.

(A) ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) ***Specific Limitations on Electronically Stored Information.*** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause,

considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(~~B~~ C) ***When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) ***Information Withheld.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(~~A~~ i) expressly make the claim; and

(~~B~~ ii) describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) ***Information Produced.*** If information ~~is~~ produced in discovery ~~that~~ is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has ~~and may~~; must not use or disclose

the information until the claim is resolved~~. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it~~ ; must take reasonable steps to retrieve ~~it~~ the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); ~~to~~ discuss any issues ~~relating to~~ about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues ~~relating to~~ about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues ~~relating to~~ about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert ~~such~~ these claims after production — whether to ask the court to include their agreement in an order;

(~~C~~ E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(~~D~~ F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records~~,~~ (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

* * * * *

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, ~~and~~ copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained ~~[em-dash] translated~~ either directly or, if necessary, after translation by the ~~respondent~~ responding party ~~translates them~~ into a reasonably usable form; or

(B) any designated tangible things ~~— and to test or sample these things~~; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request ~~must~~:

(A) must describe with reasonable particularity each item or category of items to be inspected; ~~and~~

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

* * * * *

(D) ***Responding to a Request for Production of Electronically Stored Information.*** ~~If objection is made to the~~ The response may state an objection to a requested form ~~or forms~~ for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the ~~responding~~ party must state the form or forms it intends to use.

(~~D~~ E) ***Producing the Documents or Electronically Stored Information.*** ~~Unless the parties otherwise agree, or the court otherwise orders~~ Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party ~~producing~~ must produce documents ~~for inspection must produce them~~ as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request~~.~~;

(ii) ~~i~~If a request does not specify ~~the~~ a form ~~or forms~~ for producing electronically stored information, a ~~responding~~ party must produce ~~the information~~ it in a form or forms in which it is ordinarily maintained or in a ~~form or forms that are~~ reasonably usable form or forms; and

(iii) ~~a~~ A party need not produce the same electronically stored information in more than one form.

* * * * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on

a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(e f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) ***Requirements – In General.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce ~~and permit the inspection, and copying, testing, or sampling~~ ~~of~~ designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

* * * * *

(C) ~~***Command to Produce Materials or Permit Inspection***~~ ***Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.*** A command to produce documents, electronically stored information, or tangible things or to permit the inspection~~, copying, testing, or sampling~~ of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production~~,~~ or inspection, ~~copying, testing, or sampling,~~ if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

* * * * *

(b) Service.

(1) By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection~~, copying, testing, or sampling~~;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection~~, copying, testing, or sampling~~; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) ***Appearance Not Required.*** A person commanded to produce ~~and permit inspection, copying, testing, or sampling of~~ designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) ***Objections.*** A person commanded to produce designated materials or to permit inspection~~, copying, testing, or sampling~~ may serve on the party or attorney designated in the subpoena a written objection to ~~producing~~ inspecting, copying, testing, or sampling any or all of the designated materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production~~,~~ or inspection~~, copying, testing, or sampling~~.

(ii) ~~Inspection and copying~~ These acts may be ~~done~~ required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer

from significant expense resulting from compliance.

* * * * *

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) ***~~Producing~~ Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) ***Form for Producing Electronically Stored Information Not Specified.*** If a subpoena does not specify ~~the~~ a form ~~or forms~~ for producing electronically stored information, ~~a~~ the person responding ~~to a subpoena~~ must produce ~~the information~~ it in a form or forms in which ~~the person~~ it is ordinarily ~~maintains it~~ maintained or in a reasonably usable form or forms ~~that are reasonably usable~~.

(C) ***Electronically Stored Information Produced in Only One Form.*** ~~A~~ The person responding ~~to a subpoena~~ need not produce the same electronically stored information in more than one form.

(D) ***Inaccessible Electronically Stored Information.*** ~~A~~ The person responding ~~to a subpoena~~ need not provide discovery of

electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or ~~to quash~~ for a protective order, the person ~~from whom discovery is sought~~ responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) ***Information Withheld.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(~~A~~ i) expressly assert the claim; and

(~~B~~ ii) describe the nature of the withheld documents, communications, or things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) ***Information Produced.*** If information ~~is~~ produced in response to a subpoena ~~that~~ is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the

specified information and any copies it has ~~and may~~; must not use or disclose the information until the claim is resolved ~~. If the receiving party disclosed the information before being notified, it~~; must take reasonable steps to retrieve ~~it.~~ the information if the party disclosed it before being notified; ~~A receiving party~~ and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

CHANGES MADE AFTER PUBLICATION AND COMMENT

Style Rules 1-86

Most of the changes in Styles Rule 1-86 reflect style improvements made in response to public comments and continuing work by consultants, reporters, Subcommittees A and B, the Standing Committee Style Subcommittee, and the Advisory Committee. They are marked above as changes made after publication. An explanation of each would be both burdensome and unnecessary. Many are self-explanatory. Some are set out in the introduction to the Style Project materials. Others are explained in the minutes of the May 2006 Civil Rules Committee meeting. A few changes — and decisions against change — deserve individual mention here as well.

Present Rule 1 says that the Rules govern "in all suits of a civil nature." Style Rule 1 as published changed this to "all civil actions and proceedings." Comments suggested that the addition of "proceedings" might inadvertently expand the domain governed by the Civil Rules. The Standing Committee Style Subcommittee was persuaded that "and proceedings" should be removed. Subcommittee A accepted this recommendation. Further consideration, however, persuaded the Advisory Committee that "and proceedings" should be retained. The reasons for concluding that the term "civil actions" does not express all of the events properly governed by the Rules are described in the draft Minutes for the May meeting. As noted in the introduction, the Committee Note to Rule 1 is expanded to include a general description of the Style Project.

Present Rule 25(a)(1) is a classic illustration of the "shall" trap. It says that "the action shall be dismissed as to" a deceased party unless a motion to substitute is made within 90 days after death is suggested on the record. Style Rule 25(a)(1) translated "shall"as "may," providing that the action "may be dismissed." This choice was bolstered by considering the effects of the Rule 6(b)authority to extend the 90-day period even after it expires. To say that the court "must" dismiss might distract attention from the alternative authority to extend the time and grant a motion to substitute. Comments suggested that "may" effects a substantive change. The comments took pains to express no view on the desirability of substantive change. The Committee concluded that it is better to replace "may" with "must," and to delete the Committee Note explanation of the Rule 6(b) reasons for concluding that "may" does not work a substantive change.

A syntactic ambiguity in Rule 65(d) was corrected in response to comments and further research demonstrating that the ambiguity resulted from inadvertent omission of a comma when the Rule was adopted to carry forward former 28 U.S.C. § 363. As revised, Rule 65(d) clearly provides that an injunction binds a party only after actual notice. It also clearly provides that after actual notice of an injunction, the injunction binds a person in active concert or participation with a party's officers, agents, servants, employees, and attorneys. The change is explained further in the new paragraph added to the Rule 65 Committee Note.

Finally, the Committee decided not to change the approach taken to identifying shifts of material among subdivisions. The Bankruptcy Rules Committee urged that the Committee Notes should identify decisions to rearrange material among subdivisions of the same rule to improve clarity and simplicity. In Rule 12, for example, subdivision (c) was divided between Style Rule 12(c) and (d), while former subdivision (d) became Style Rule 12(I). The purpose of expanding the Committee Notes would be to alert future researchers — particularly those who rely on tightly focused electronic searches — to define search terms that will reach back before the Style Amendments took effect. The approach taken in the published Style Rules was to identify in Committee Notes only the one instance in which material was shifted between Rules — from Rule 25 to Rule 17. Forty-four shifts among subdivisions of the same rule were charted in Appendix B, "Current and Restyled Rules Comparison Chart." The chart is set out below. The Committee decided again that this approach is better than

the alternative of adding length to many of the Committee Notes. It can be expected that many rules publications will draw attention to the changes identified in the chart.

Style-Substance Track

Two rules published on the Style-Substance Track were abandoned.

Rule 8 would have been revised to call for "a demand for the relief sought, which may include ~~relief in the~~ alternative forms or different types of relief." Comments showed that the old-fashioned "relief in the alternative" better describes circumstances in which the pleader is uncertain as to the available forms of relief, or prefers a form of relief that may not be available.

Rule 36 would have been amended to make clear the rule that an admission adopted at a final pretrial conference can be withdrawn or amended only on satisfying the "manifest injustice" standard of Style Rule 16(e). Revisions of Style Rule 16(e) make this clear, avoiding the need to further amend Rule 36.

Civil Forms

Two changes in the Style Forms bear note.

Form 19, the complaint for copyright infringement, was revised so that paragraph 8 no longer implies that there might be a common-law remedy for simply continuing to publish and sell an infringing book.

Form 51, a request for Rule 36 admissions, was revised to incorporate the 30-day period to respond set by Rule 36. The fill-in-the-blank approach taken by present Form 25 might mislead some practitioners into specifying an invalid shorter period.

"E-Discovery" Style Amendments: Rules 16, 26, 33, 34, 37, and 45

As noted above, the Style revisions to the "e-discovery" amendments published for comment in 2004, before the Style Project was published for comment in 2005, are all "changes made after publication." All involve pure style. They can be evaluated by reading the overstrike-underline version set out above.

Appendix A – Civil Rules Style Project Global Drafting Issues

Note – This chart does not include the restyled electronic-discovery amendments to Rules 16, 26, 33, 34, 37, and 45

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
1	*"a party or a party's legal representative"*	Only in Rule 60(b).	Use "a party or its legal representative."	✓
2	*"of record"* / *"on the record"* / *"upon the record"* *"into the record"*	5(a), 11(a), 26(g)(1), 26(g)(2), 39(a), 43(e), 65(b), 69(a) 51(b), 51(c), 51(d) 25(a)(1), 25(a)(2), 30(b)(4), 30(c), 72(b) 72(a)	In general, use "on the record." Change 30(c)(2) from "in the record" to "on the record." (Style rule 5(a), 39(a), and 43(c) don't use "of record." In context, the other uses of "of record" (e.g., "attorney of record") are okay. All uses of "upon the record" have been converted to "on the record" or been deleted. New 72(a) doesn't use "into the record.")	✓
3	*"action"* / *"case"*	"Case" rather than "action" is used to refer to a pending lawsuit in Rules 1, 9(h), 16(a)(2), 16(a)(5), 16(b)(6), 16(c)(13), 19(a), 26(a)(1)(E), 26(a)(2)(B), 26(a)(2)(C), 26(b)(2), 26(b)(3), 26(f), 26(g)(2)(C), 27(b) 30(a)(2)(B), 30(f)(1), 31(a)(2)(B), 32(c), 50(a)(2), 55(b)(2), 56(d), 57, 63, 65(e), 71A(h), 72(a), 72(b), 73(a), 73(b), 81(c), 83(b).	Uniformly retain "case" as it occurs in current rules. Exceptions: 1) In Rule 1, the former reference to "suits of a civil nature" has been changed to "actions and proceedings." 2) In Rule 73(a) and (b), changed "case" to "action"	✓
4	*"adverse party"* / *"opposing party"*	"adverse party" – 8(b), 12(b), 15(a), 15(d), 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 41(a)(1), 56(a), 56(c), 56(e), 60(b), 62(b), 62(c), 65(a)(1), 65(b), 68 "opposing party" – 13(a), 13(b), 13(c), 13(i), 18(a), 37(a)(4)(A), 59(c).	Use "opposing party" unless "adverse party" is necessary for substantive reasons. Exceptions: "adverse party" is retained in the style drafts of Rules 27(a)(1), 27(a)(2), 32(a)(2), 32(a)(4), 65(a)(1) and 65(b). *See* Prof. Marcus memo (Style 556) highlighting those places where it may be important to retain "adverse party."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
5	*"agree" / "stipulate" / "consent"*	*See* the list in STYLE 442.	**Note:** This issue will be addressed in the top-to-bottom review.	✓
6	*"allege" / "aver"*	*"allege"* or *"allegation"* – 11(b)(3), 11(c)(1), 23(d), 23.1, 56(e) *"aver"* or *"averment"* – 8(b), 8(d), 8(e), 9(a), 9(b), (c), (d), (e), (f), 10(b), 22(1), 55(b)(2).	Uniformly use "allege" or "allegation" rather than "aver" or "averment." Exceptions: Rule 8(e) changes "aver" to "plead. In Rule 9(a)(2), Style Subcommittee suggests changing "a specific negative averment" to "a specific denial." Rule 10(b) changes "all averments of claims or defenses" to "a party must state its claims or defenses." Rule 22(1) changes "the plaintiff avers that the plaintiff is not liable" to "the plaintiff denies liability."	✓
7	*"assert" / "state"* Which of these verb(s) (or their variants) should be used in describing the act of putting forth in litigation a claim or defense?	*"state"* – 7(b), 8(a), 8(b), 8(e)(2), 9(b), 9(g), 10(b), 12(b), 12(h)(2), 13(a), 13(b), 13(g), 15(d), 18(b). *"assert"* – 4(n), 5(a), 8(b), 12(a)(3)(A), 12(b), 13(d), 13(g), 14(a), 14(b), 14(c), 15(c)(2), 18(a), 19(c), 20(a), 20(b), 23(g)(1)(C)(i), 23.1(a), 24(c), 50(c), 50(d), 56(b).	Use "assert" and "state" as in the current rules. Exception: Current Rule 13(a): "pleader is not stating any counterclaim" has been restyled as "pleader does not assert any counterclaim." Rule 45(d)(2)(A): "expressly assert the claim" has been restyled as "expressly make the claim."	✓
8	*"attorney" / "counsel"*	*"attorney"* appears frequently. *"counsel"* – 23(c), 23(g), 23(h), 26(a)(1)(E)(iii), 30(b)(4), 32(a)(3), 53(a)(2), and 56(d). *"attorney or counsel"* – 28(c)	Uniformly use "attorney" when referring to a party's legal representative.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
9	*"attorney's fees" / "attorneys' fees" / "attorney fees"*	4(d), 11(c)(1)(A), 11(c)(2), 16(f), 23(g)(1)(C)(iii), 23(g)(2)(C), 23(h), 23(h)(1), 26(g)(3), 30(d)(3), 30(g)(1), 30(g)(2), 37(a)(4)(A),(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 37(g), 45(c)(1), 54(d), 54(d)(1), 54(d)(2)(A), 54(d)(2)(D), 56(g), 58(a)(1)(C), 58(c)(2)	Uniformly use "attorney's fee(s)."	✓
10	*"directed [by the court]" / "ordered [by the court]"*	*"directs[ed]"* – 4(c)(2), 4(f)(3), 4(g), 4(m), 5(c), 11(c)(1)(B), 11(c)(2), 12(a)(2), 16(a), 23(c)(2)(A), 23(c)(2)(B), 23(c)(3), 23(d), 23(e)(1)(B), 23(g)(1)(C)(iii), 23.1, 25(c), 26(a)(2)(B), 26(a)(2)(C), 26(a)(3), 26(c)(8), 29, 30(d)(1), 32(c), 33(b)(3), 34(b), 37(b)(1), 43(e), 43(f), 49(b), 50(b)(1)(C), 50(b)(2)(B), 50(d), 51(a), 53(b)(2), 53(c), 53(d), 53(e), 53(f), 54(b), 54(d)(1), 54(d)(2)(B), 56(d), 59(a), 62(h), 69(a), 70, 71A(h), 72(b), 73(c), 77, 79(b), 81(c)	In general, use "order" rather than "direct." Exceptions: Do not make any change in 5(c)(2) (too clumsy); 26(c)(1)(F),(G), and (H) (the introductory words already refer to "ordering"); any of 49 ("direct" seems better for telling the jury what to do); 50(b)(3) ("direct the entry of judgment"); 53(b)(2) (again, too clumsy with "order" already in the sentence; you don't want to say the order orders); and 59(a)(2) (another one directing the entry of judgment). Rule 69(a)(1): "unless the court orders otherwise" has been changed to "unless the court directs otherwise."	✓
11	*"Court in the district ...." / "court for the district ...."*	*"in"* – 26(c)(1), 27(a)(1), 30(d)(4), 37(a)(1), 37(b)(1) *"for"* – 45(a)(2)	Uniformly use "court for the district." (Style 30 and 37 now omit the reference.)	✓
12	*"crossclaim" / "cross-claim"*	5(c), 7(a), 8(a), 12(a)(2), 12(a)(3)(A), 12(a)(3)(B), 12(b), 13(g), 13(h), 13(i), 14(a), 16(a)(13), 18(a), 22(1), 41(c), 42(b), 54(b), 55(d), 56(a), 56(b)	Uniformly use "crossclaim" with no hyphen.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
13	*"considered" / "deemed"*	*"consider[s][ed]"* – 9(f), 37(b)(1), 50(b), 52(a), 62(c), 78 *"deem[s][ed]"* – 5(c), 12(e), 15(d), 17(c), 27(a)(3), 38(c), 40, 41(a)(2), 41(d), 45(e), 47(a), 49(a), 55(b)(2), 56(d), 65(c), 68, 72(b), 77(a),	Uniformly use "considered."	✓
14	*"determine" / "decide"*	*"determine"* – 11(c), 12(d), 19(b), 23(c)(1)(A), 26(a)(1)(E), 26(b)(2), 36(a), 50(a)(1), 50(d), 54(b), 54(d)(2)(C), 55(b)(2), 65(b), 65(e), 68, 71A(h), 71(A)(i)(1), 71(A)(i)(3), 72(a) *"decide"* – 53(a)(1)(B), 53(g)(3), 53(g)(4).	Retain the uses of "decide." On the "determine" list, change the following to "decide": 12(d) [now 12(i)]; 50(a)(1)(A); 54(d)(2)(C); 65(b)(5); 65(e)(3); and 72(a).	✓
15	*"action ... brought in a United States district court" /* *"district court" / "court of the United States" / "United States district court"*	27(a)(4) *"court of the United States"* – 17(b), 23.1, 27(a)(1), 32(a)(4), 41(a)(1) *"United States district court"* – 1, 27(a)(1), 27(a)(4), 81(a)(4), 81(a)(5), 81(c), 82 *"district court"* – 7.1(a), 9(h), 16(b), 23(f), 27(b), 40, 52(b), 62(c), 62(f), 65(e), 66, 73(a), 73(c), 77(a), 77(c), 78, 81(a)(3), 81(a)(4), 81(a)(5), 83(a),	Rule 27(a)(4) authorizes use of a deposition in an action "subsequently brought in a United States district court." Restyled rule 27 adopts the phrase "later-filed district-court action." The style drafts change "court of the United States" to "United States court," except in Rule 23.1 where it is simply "the court." *See* Marcus research memos on this issue. STYLE 335 and 428B The style drafts change "United States district court" to "district court" in Rule 27, but retain United States district court in Rule 1. The style drafts generally retain "district court," but sometimes translate it simply as "court." Resolution: Change from "district court" to "court" in 77(c)(1) and 78.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
16	*"entry [enter] upon land" / "entry onto land"*	5(d)(1), 26(a)(5), 34(a)	Uniformly use "entry onto land." (Style 26 omits the reference.)	✓
17	*"fails to obey" / "is not obeyed" / "disobedient"* *["disobey" does not appear in the rules]*	*"fail[s][ure] to obey"* – 16(f), 37(b)(2), 45(e) *"is not obeyed"* – 12(e) *"disobedient"* – 37(b)(2), 70	Uniformly use to "fail[] to obey" as verb phrase. Uniformly use "disobedient" as adjective. *Note*: Style draft of Rule 12 still uses "is not obeyed" because the sentence is in passive voice.	✓
18	*"federal statute" / "United States statute" / "Act or act of Congress"*	4(k)(1)(D), 4(n)(1), 4.1(a), 12(a)(1), 17(a), 24(a), 24(b), 24(c), 38(a), 39(a), 39(c), 40, 41(a)(1), 42(b), 45(b)(2), 54(d)(1), 55(b)(2), 62(c), 64, 65(e), 69(a), 71A(h), 81(a)(2), 81(a)(3), 81(e), 83(a)(1)	Uniformly use "federal statute."	✓
19	*"federal law" / "United States law" / "Constitution [and/or] laws of the United States"*	4(e), 4(f), 4(h), 4(k)(2), 4.1(b), 17(b), 28(a), 28(b), 43(a), 71A(h), 83(b)	Uniformly use "federal law." Exception: Rules 4(k)(2)(B) and 17(b)(3)(A) will remain "the United States Constitution and laws."	✓
20	*"Federal Rules of Evidence" / "rules of evidence"*	*"Federal Rules of Evidence"* – 16(c)(4), 26(a)(2)(A), 30(c), 32(a)(1), 32(a)(4), 43(a), 44.1 *"rules of evidence"* – 32(a), 33(c),	Uniformly use "Federal Rules of Evidence."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
21	*"for good cause" / "for cause shown" / "for good cause shown" / "shows good cause" / "showing of good cause" / "for valid cause"*	*"for good cause"* – 26(a)(3), 26(b)(1), 32(c), 47(c), 59(c) *"for cause shown"* – 6(b), 6(d), 31(a)(4), 45(b)(3), 78(c) *"for good cause shown"* – 4(d)(2), 26(c), 33(b)(4), 35(a), 43(a), 44(a)(2), 55(c), 65(b), 73(b) *"shows good cause"* – 4(m) *"showing of good cause"* – 16(b) *"for valid cause"* – 71A(h)	Uniformly use "for good cause." *Note:* 4(d)(2) and 4(m) have minor variants. (43(a) omits the reference to good cause.)	✓
22	*"in its discretion"*	6(b), 16(a), 23(f), 39(b), 43(f), 62(b), 62(c), 71A(h)	Uniformly omit "in its discretion."	✓
23	*"in/under [subdivision]["(a)", etc.]"* *vs.* *in/under "(a)", etc.*	Numerous rules.	**Note:** This issue will be addressed in the top-to-bottom review.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
24	*"issue" / "make" / "enter"* Which verb(s) (or variant) should be used in referring to a judge's creation (issuance, making, entry) of a court order?	*"enter"* – 11(c)(1)(B), 16(b), 16(e), 25(d)(1), 26(a)(1)(D), 26(f)(4), 37(a)(4)(B), 37(a)(4)(C), 37(b)(2), 53(b)(3), 53(e), 65(b)(2), 72(a), *"issue"* – 4(b), 4(k)(1)(B), 4.1(b), 11(c)(2)(B), 16(b), 65(a), 65(c), *"make"* – 12(e), 16(f), 17(c), 20(b), 23.2, 26(c), 27(a)(2), 27(a)(3), 27(b), 35(b)(1), 37(b)(2), 37(c)(2), 37(d), 41(d), 42(a), 53(e), 56(d), 56(f), 62(g), 71, 78,	Uniformly use "issue" rather than "make" or "enter" in reference to orders. Exception: 1) use "enter" or "entry" in reference to entry of judgment.	✓
25	*"just" / "appropriate" / "[when] {if} justice so requires" / "which justice requires" / "in the interest of justice"*	*"just" / "justice requires" / "interest of justice"* – 8(c), 12(e), 13(f), 15(a), 15(d), 16(f), 21, 26(c), 26(d), 27(a)(2), 27(a)(3), 28(b), 35(b)(1), 37(a)(4)(C), 37(b)(2), 37(d), 56(d), 56(f), 60(b), 61, 65(b), 71A(h); *"appropriate"* – 23(d), 23.2, 62(g),	Resolution: In 26(c)(1), omit "that justice requires"; in 28(b)(2), omit "in an appropriate case"; and in 56(f)(3), change "appropriate" back to "just". *See* STYLE 462, Kimble memo on "qualifiers and intensifiers."	✓
26	*"make any [just?] order"* Should "any order" always be qualified with a term such as "just"?	*"may make any order which justice requires"* – 26(c) *"may make such orders in regard to the failure as are just"* – 37(d) *"make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."* 62(g)	Resolution: no changes to style drafts.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
27	*"minor" / "infant"*	*"infant"* – 4(e), 4(f), 4(g), 17(c), 55(b)(1), 55(b)(2) *"minor"*– 27(a)(2)	Uniformly use "minor."	✓
28	*"file" / "make"* (in reference to a motion)	*"make[s] a motion"* – 12(g), 27(b), 30(d)(4) *"motion made"* – 6(b), 12(f), *"motion filed"* – 52(b) *"may ... move"* – 56(a), (b)	Style draft of 12(g) retains "make a motion." Style draft of 27(b) adopts: "may move." Style draft of 30(d)(4) translates the current rule language – "suspended for the time necessary to make a motion for an order" to "time necessary to obtain an order." 6(b) and 12(f) retain "motion made" 52(b) retains "motion filed" Style draft of 56(a) adopts "motion may be filed" and 56(b) retains "may move" Resolution: no changes to style drafts.	✓
29	*"must" / "may" / "should"* *"must not" / "may not"* *"must" / "should"*	The issue arises throughout the rules.	**Note:** This issue will be addressed in the top-to-bottom review. *See* research reports from Prof. Rowe (STYLE 196) and committee staff (STYLE 209*i*).	✓
30	*"nonjury trial" / "trial without a jury"*	*"trial without a jury"* – 39(c), 52(c), 63 *"nonjury trial"* – 73(a)	Uniformly use "nonjury trial."	✓
31	*"on its own" / "on its own initiative" / "on its own motion"/ [note: "sua sponte" does not appear in the rules]*	4(m), 5(c), 11(c)(1)(B), 11(c)(2)(B), 12(f), 16(f), 21, 26(b)(2), 26(g)(3), 39(a), 39(c), 59(d), 60(a), 73(b), 81(c)	Uniformly use "on its own."	✓
32	*"on motion" / "upon motion"*	The issue arises throughout the rules.	Uniformly use "on motion."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
33	*"On [upon] reasonable notice" / "on notice"* There are numerous variations on these, as noted here.	*"[on] [upon] [after] notice"* – 4(m), 11(c), 12(a)(4)(A), 12(e), 14(a), 28(b), 35(a), 40, 44.1, 45(c)(2)(B), 53(b)(4), 53(h)(1), 59(d), 67 *"reasonable notice" – 16(d)*, 26(b)(2), 30(b)(1), 32(a), 37(a), *"[with] prior notice"* – 30(b)(3), 45(b)(1), *"prompt notice"* – 30(f)(3) *"proper notice"* – 37(d)	Resolution: In general, preserve the language of the current rules. In some cases, however, the style drafts adopt "on notice" instead of "on reasonable notice." One change: Delete "proper" in 37(d)(1)(A)(i).	✓
34	*"opportunity to be heard" / "opportunity for hearing"*	*"opportunity to be heard"* – 37(a)(4), 37(c), 53(b)(1), 53(b)(4), 53(g)(1), 53(h)(1), 59(d) *"opportunity for hearing"* – 37(g)	Uniformly use "opportunity to be heard."	✓
35	*"pleader"* Should "pleader" or "party" be used to refer to a pleading party?	*"pleader"* – 8(a), 8(b), 9(a), 12(b), 13(a), 13(e), 13(f), 19(c)	The style drafts substitute "party" for "pleader" in all instances where the current rule uses "pleader" except in Rules 8(a) and 13(a). Resolution: No need to change.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
36	*"permit" / "allow"*	*"allow[ed]"* – 4(a), 4(c)(1), 4(d)(2)(F), 4(f)(2), 4(i)(3), 4(l), 6(a), 6(b), 7, 14(b), 16(c)(15), 17(a), 25(b), 27(b), 30(d)(1), 30(e), 32(a)(3)(E), 32(d)(3)(C), 36(a), 37(b)(2)(B), 43(a), 45(b)(1), 45(c)(3)(A)(i), 47(b), 50(b)(1)(A), 54(d), 62(d), 68, 71A(d)(4), 71A(e), 71A(f), 71A(h), 77(c), 77(d), *"permit[ted]"* – 5(d), 5(e), 6(b), 6(d), 8(d), 12(a)(4), 12(b), 12(e), 12(f), 12(g), 12(h)(1), 12(h)(2), 13(e), 15(a), 15(c)(1), 15(d), 16(b)(4), 22(1), 23(f), 24(a), 24(b), 26(b)(2), 26(c), 26(f), 30(c), 32(a)(1), 32(a)(4), 33(c), 33(d), 34(a), 34(b), 36(b), 37(a)(2)(B), 37(b)(2), 37(c)(1), 43(a), 44(a)(2), 45(a)(1)(C), 45(b)(2), 45(c)(2)(A), 45(c)(2)(B), 47(a), 54(d)(1), 56(e), 56(f), 59(c), 65.1, 67, 71A(h), 71A(j), 77(d)	Use "permit" rather than "allow," except in reference actions that are controlled by a rule. Change "permit" to "enable" in Rules 33(d) and 56(f).	✓
37	*"prescribed in" / "prescribed by" / "provided in" / "provided by"* *"as provided" / "as prescribed" / "in accordance with" / "in the manner provided" / "pursuant to" / "under"*	various rules	**Note:** This issue will be addressed in the top-to-bottom review.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
38	*"pretrial conference"* To what extent can this term be used generically for all types of pretrial judge-party conferences (including scheduling, settlement, and status)?	16, 26(a)(1), 26(f), 33(c), 36(a) "Rule 16(b) conference" appears in 26(f) "Rule 26(f) conference" appears in 26(a)(1)	Use "pretrial conference" when reference is generic, but not when it is specific. Style 16 and 36(a) use "pretrial conference" in a generic sense. Style 26 continues to refer to a "16(b)" conference and, internally, to the "26(f)" conference. These specific references were retained and seem appropriate. (Style 33 no longer makes any reference.)	✓
39	*"question of law or fact"* *"issue of fact"* *"question of law"*	*"question[s] of law or fact"*– 20(a), 23(a), 23(b)(3), 24(b), 42(a) *"issue[s] of fact"* – 38(c), 49(a), 49(b) *"question of law"* – 44.1 *"factual contentions"* – 11(b)(3), 11(b)(4)	The style draft translates "question of law or fact " to "legal or factual question" in Rule 20(a), but the style draft retains "question of law or fact" in Rule 24(b), 42(a). Style draft of Rule 38(c) translates "issues of fact" to "factual issues." Style draft of Rule 49(a) and (b) retains "issue[s] of fact." The style draft retains "question of law" in Rule 44.1 The style draft retains "factual contentions" in Rule 11(b)(3) and (4). Resolution: No changes to style drafts, except in Rule 20(a)(1)(B) change "legal or factual question" to "question of law or fact."	✓
40	*"reasonable expenses incurred ..."* Regarding the motion? For the motion?	11(c)(1)(A), 16(f), 26(g)(3), 30(g)(1), (2), 37(a)(4)(A), (B), and (C), 37(b)(2), (c)(1), (c)(2), (c)(d), and (g), 56(g)	Resolution: ok to vary these, but 11(c) and 26(g) should be consistent.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
41	*"secure" / "obtain*	*The rules use "obtain[ed][ing][able]" throughout.* *Rule 37 used both obtain and secure: "secure" at 37(a)(2)(A) and (B), but "obtain" at 37(a)(4)* *"secure" otherwise appears only in 1, 62(c), and 62(h)*	Uniformly use "obtain." Exception: *Rule 1*, because of tradition, and *Rule 62(c) and (h)*, which would either need to retain "secure" or use a different phrasing.	✓
42	*"service of summons or [other] like process" / "service of process"* *"after service" /"after . . . is served" / "after being served" / "after . . . has been served"*	*"service of [a] summons"* – 4(d)(1), 4(g), 4(j)(2), 4(n)(2), 5(a), 27(a)(2), 81(c) *"service of process"* – 4(d)(2)(A), 4(e)(2), 4(h)(1), 12(b)(5), 12(h)(1), 19(a), 5(d), 6(e), 11(c), 12(a)(1), 12(a)(2), 12(a)(3), 12(a)(4)(B), 12(f), 15(a), 16(b), 25(a)(1), 26(a)(1), 31(a)(4), 32(d)(3)(C), 33(b)(3), 33(d), 34(b), 36(a), 37(d), 38(b), 38(c), 41(c), 45(c)(2)(B), 53(g)(2), 56(a), 59(c), 68, 71A(d)(2) 71A(e), 72(a), 72(b), 81(c)	Resolution: 1) Change Rule 4(g) to "service of a summons." 2) Change Rule 59(c) from "after service" to "after being served." 3) Change Rule 71.1(d)(2)(A)(v) from "after service of the notice" to "after being served with the notice."	✓
43	*"state in which the district court is <u>located</u>" / "state in which the district court is <u>held</u>"*	*"located"* – 4(e)(1), 4(k)(1)(A), 4(n)(2), 4.1(a) *"held"* – 6(a), 17(b), 64, 69(a), 81(e)	Uniformly use "state where the district court is located."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
44	*"substantial [justice] [rights]" / "substantially [justified] [impair] [verbatim] [unprepared]"*	8(f), 16(f) (twice), 19(a), 23(b)(1)(B), 25(d)(1), 26(b)(3) (three times), 26(g)(3), 33(d), 37(a)(4)(A), 37(a)(4)(B), 37(b)(2), 37(c)(1), 37(c)(2), 37(d), 45(c)(3)(B)(iii)(twice), 51(d)(2), 56(d)(twice), 61(twice),	Resolution: Delete "substantial" from Rule 8(f). (The style drafts of Rules 1-37 & 45 generally retain the current rule language (repeating "substantially" or "substantial" in the style drafts), while the Rule 38-63 style draft deletes "substantial." See STYLE 462, Kimble memo on "qualifiers and intensifiers.")	✓
45	*"that is" / "who is"* Which phrase(s) should be used when discussing a party or potential party that can be either a natural person or an organization (i.e., government agency, corporation, partnership)?	*"that is"* – 4(d)(2), 4(h), 9(a), *"who is"* – 4(c)(2), 4(k)(1)(B), 14(a), 17(b), 19(a), 25(d), 26(a)(2)(B), 26(b)(4)(B), 28(c), 31(a)(3), 37(a)(1), 45(b)(1), 45(b)(2), 45(c)(2)(B), 45(c)(3)(A), 63, 65(c), 71, 77(d) *"party which is"* – 11(c)(5)(B) *"defendant who"* – 4(d)(1), 4(k)(1), (2), 14(c)	Resolution: ok to vary.	✓
46	*"the court shall require ... unless the court finds..."* *restyle to:* *"the court must require ... unless ....* *or* *"the court must require ....But the court may not order .... if..."*	37(a)(4), 37(b)(2), 37(c)(2), 37(d)	Resolution: ok to vary.	✓
47	*"trial of all issues"*	39(a), 71(h)	Uniformly use "trial on ... issues."	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
48	*"trial by jury" / "tried before a jury"*	*"trial by jury"* – 38(a - e), 39 (a - c), 42(b), 49(a), 50(a)(1), 55(b)(2), 57, 59(a), 65(a)(2), 71A(h), 71A(k), 79(a), 81(c) *"tried before a jury"* – 32(c)	Uniformly use "jury trial," except for 38(a) and 39(a), which retain "trial by jury."	✓
49	*"waive[r]" "waiving" /*	4(many), 8(c), 12(b), 12(h), 24(c), 26(a)(3), 32(d)(1) 32(d)(2), 32(d)(3)(A), 32(d)(3)(B), 32(d)(3)(C), 32(d)(4), 33(b)(4), 35(b)(2), 38(d), 45(c)(3)(A)(iii), 49(a), 53(b)(3), 71A(e), 81(c)	Uniformly use "waiver."	✓
50	*"writing" / "paper"*	*"writing"* – 4(i)(1)(A), 34(a) *"paper"* – 5(a), 5(d), 5(e), 6(a), 6(e), 7(b)(2), 11(a), 11(b), 11(c)(1)(A), 45(c)(2)(A), 56(e), 65.1, 77(a), 77(d), 79(a)	Resolution: no changes to style drafts.	✓
51	*cross-references* and *hortatory references*	Arises frequently throughout the Civil Rules.	**Note:** This issue will be addressed in the top-to-bottom review.	✓
52	*geographic references: "any judicial district of the United States" / "the United States" / "the United States or a territory or insular possession subject to the jurisdiction of the United States"*	Rules 4(d)(1(E), 4(d)(2), 4(d)(3), 4(e), 4(f), 4(g), 4(h)(1), (2), 4(k)(1)(B), 4(*l*)(2), 4.1(b), 12(a)(1)(A)(ii), 25(a)(3), 28(a), 30(a)(2)(C), 32(a)(3)(B), 44(a)(1), 45(b)(2), 71A(d)(3)(A)	Resolution: No changes to style drafts. (Subcommittee A decided that the restyled rules should continue to use the geographic terms used in the corresponding provisions of the current rules. This decision is reflected in the latest style drafts.) Research and email exchanges on this issue include: STYLE 35, 42, 43, 48, 49, and 118.	✓

#	Issue	Occurrences in the Current Rules	Status/Recommendation (✓in far-right column means resolved as noted)	✓
53	*governmental agencies, officers, employees, and other instrumentalities*	Rules 4(i), 4(j), 12(a)(2), (3), 13(d), 15(c)(2), 24(b)(2), 24(c)(2), 30(b)(6), 31(a)(3), 32(a)(2), 33(a), 45(b)(1), 54(d)(1), 55(e), 62(e), 65(c), 81(a)(3), 81(f)	Resolution: 1) In Rules 4(i)(2), 4(i)(3) and (4)(i)(4)(B) change to "a United States agency or corporation" and "a United States officer or employee." 2) In the first clause of Rule 5(c)(2), reverse the order of "agency" and "officer."	✓

Appendix B – Current and Restyled Rules Comparison Chart

Note: This chart compares the current rules with the restyled rules (to the subdivision level). For additional information, see the Committee Notes for specific rules. This chart does not include the restyled electronic-discovery amendments to Rules 16, 26, 33, 34, 37, and 45

Current Rule	*Restyled Rule*
5(e)	5(d)(2)-(4)
6(d)	6(c)
6(e)	6(d)
7(c)	Deleted
8(d)	8(b)(6)
8(e)	8(d)
8(f)	8(e)
12(b)(final sentence) and 12(c)(final sentence)	12(d)
12(d)	12(i)
16(d)	16(e)
16(e)	16(d)
22(1)	22(a)
22(1)(final sentence) and 22(2)	22(b)
23.1	23.1(a)-(c)
25(d)(2)	17(d)
26(a)(5)	Deleted
30(d)(1)	30(c)(2)(second and third sentence)
33(a)(part of first sentence)	33(b)(1)
33(c)(part of first sentence, second paragraph)	33(a)(2)
37(g)	37(e)
43(d)	43(b)
43(e)	43(c)
43(f)	43(d)
50(c)(2)	50(d)
50(d)	50(e)
52(b)(final sentence)	52(a)(5)
53(d)	53(c)(1)(C)
53(e)	53(d)
53(f)	53(e)
53(g)	53(f)

Current Rule	*Restyled Rule*
53(h)	53(g)
53(i)	53(h)
55(d)	Deleted
55(e)	55(d)
56(c)(final sentence)	56(d)(2)
58(a)(2)	58(b)
58(b)	58(c)
58(c)	58(e)
60(b)(second sentence)	60(c)
60(b)(third sentence)	60(d)
60(b)(fourth sentence)	60(e)
80(c)	80
81(e)	81(d)
81(f)	Deleted

SUPERSESSION AND THE STYLE PROJECT

I. Introduction

The public comments to the Style Project include expressions of concern that the Style amendments to the Civil Rules may "supersede" conflicting provisions in statutes in effect when the amendments are enacted. The supersession provision of the Rules Enabling Act, Section 2072(b), provides that laws that conflict with an Enabling Act rule "shall be of no further force or effect after such rule[] [has] taken effect." The concern is that adopting the Style Rules will generate arguments that all provisions in every Civil Rule have "taken effect" on the date the Style Rules were enacted – anticipated to be December 1, 2007 – making them supersede any inconsistent statute enacted before that date.

This issue is not new to the Style Project. It was raised and addressed in the earlier Style Amendments to the Appellate and Criminal Rules. The first two parts of this memorandum explore the reasons why the concern about supersession does not present a problem for the Civil Rules Style Project. At the same time, this memorandum recognizes that just as it is important for the Style Project to state explicitly and clearly that the amendments are intended to be stylistic only, it is also useful to state explicitly and clearly that the relationship between the Rules and existing laws is unchanged. The third part of this memorandum examines alternative ways to accomplish this goal. The memorandum recommends a statement in Rule 86 that addresses and should foreclose the supersession concern.

Adoption of a new Rule 86(b) would make explicit the relationship between the Style amendments and existing statutes and address the supersession concern described at length in the memorandum that follows. The proposed rule and committee note take into account the new E-Government Act rule, Rule 5.2, which is also expected to take effect on December 1, 2007. Rule 5.2 must be kept on the same schedule as the corresponding E-Government Act provisions in the

Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2 is properly measured from December 1, 2007. The Rule 86(b) draft accommodates this by stating that the December 1, 2007 "amendments" do not "change" the effective date, and the Committee Note explicitly addresses Rule 5.2.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 86. Effective Dates

1 * * * * *

2 (b) *December 1, 2007 Amendments.* The amendments
3 adopted on December 1, 2007 do not change the date on
4 which any provision that conflicts with another law took
5 effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

Finally, an appendix to this memorandum provides further research supporting the Supreme Court's authority to improve the expression of the rules, without changing substantive meaning or supersession consequences, within the Rules Enabling Act.

II. The Supersession Concern

The Rules Enabling Act begins with §§ 2072(a) and (b):

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

The second sentence of § 2072(b) is often referred to as the "supersession" clause. By general acceptance, it operates on a last-in-time principle akin to conflicting statutes. An Enabling Act rule provision supersedes an earlier conflicting statute; a statute supersedes an earlier conflicting Enabling Act rule provision. The words "no further force or effect" can refer only to a statute existing at the time a rule is adopted.

Whether a rule conflicts with an existing statute depends on the meaning of each. The Style Project is intended to make it easier to understand the Civil Rules and to make style and terminology consistent throughout the Rules. The changes are stylistic only. Each rule will have the same substantive meaning on December 1, 2007, that it had before that date. Because substantive meaning does not change when the Style Rules take effect, the relationship between the Civil Rules and any previously-enacted conflicting statute also remains the same.

Prior experience with rule amendments fully supports this conclusion. The Rules Enabling Act rules have been amended a number of times. Those amendments range in purpose and nature from adding entirely new rules to changing the substantive meaning of portions of rules to making small or technical changes that have little if any effect on meaning. A rule does not supersede a statute with a conflicting provision whenever there is an amendment to any part of that rule, no matter how small, how technical, or how unrelated to the conflicting statutory provision. Instead, supersession is determined by looking to the nature and purpose of the amendment and comparing

the date of the statute with the date the particular substantive rule provision that is inconsistent with that statute first "took effect."

There are very few conflicts between the Civil Rules and existing statutes and the issue is unfamiliar to most lawyers and judges. There are good reasons for the scarcity of conflicts. Many procedure statutes disappeared after enactment of the Rules Enabling Act in 1934 and recodification of the Judicial Code in 1948. Since then, Congress generally has been content to entrust development of procedural rules to the Enabling Act process, and the Supreme court and the Judicial Conference have been careful to avoid knowing supersession of statutory provisions. The occasions for colorable claims of conflict between statute and rule are rare. But some do occur. The most commonly cited conflict is the relationship between Civil Rule 11 and the Private Securities Litigation Reform Act. Rule 11 was last substantively amended in 1993. The PSLRA was enacted in 1995. It includes provisions that are inconsistent with Civil Rule 11.[1] In 1995, the PSLRA superseded the inconsistent provisions of Rule 11 that took effect in 1993. If the remaining steps in the Style Project occur on schedule, Rule 11, amended only for style, will take effect on December 1, 2007. Because the Style amendments do not change the substantive meaning of Rule 11, that date does not affect the relationship between Rule 11 and the PSLRA. That relationship is determined by the time when the Rule's substantive provision that is inconsistent with the PSLRA first took effect, compared to the effective date of the PSLRA. Because the substance of the inconsistent provisions of Rule 11 took effect two years before the PSLRA, the Style amendments – which are unrelated to the substance of the conflicting provisions – do not change the supersession relationship. The statute still trumps the rule.

Stated more generally, the supersession determination depends on comparing the date the substantive rule provision that conflicts with the statute became effective with the date the

[1] The PSLRA also establishes special pleading standards and provides for a stay of discovery on terms that may be inconsistent with the Civil Rules.

conflicting statute became effective. The later date controls, not subsequent dates when the rule is again amended in some way that does not affect or have any bearing on the substance of the conflicting provision. The Style Project does not change supersession effects because the changes – including those made in the few rules that may conflict with statutory provisions in effect on December 1, 2007 – are intended to be stylistic only.

III. Precedents on Supersession

Past style revisions provide supporting precedent for the conclusion that the Style Project will not change the supersession relationship between the Civil Rules and statutes in effect on December 1, 2007. Most of the Civil Rules were amended in 1987 to achieve a gender-neutral style. There is no evidence of any suggestion that those amendments had an effect on supersession. The Appellate Rules were the first to be completely restyled. As described below, the few cases that address supersession after the Appellate Rules were restyled recognize that the style changes do not affect supersession. One case appears to have adopted a different approach, but that case did not focus on the issue.

The Criminal Rules were the next to be restyled. The Rules Committees recognized that the pre-Style version of Criminal Rule 48(b) had been followed by the Speedy Trial Act, which was inconsistent in important respects. The 2002 Committee Note accompanying the Style Rules stated that "[i]n re-promulgating Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy Trial Act." There is no evidence of any attempt to argue that Rule 48(b) now supersedes the Speedy Trial Act. Instead, the Speedy Trial Act continues to apply over inconsistent provisions of Style Rule 48(b).

The decisions that focus on the supersession question follow the approach set out above. There are a few cases that could be read to support a different approach, but they did not actually focus on the question. The existence of these cases, however, provides another reason to make an

explicit disclaimer of any supersession effect from adopting the Style version of the Civil Rules.

Autoskill Inc. v. National Education Support Systems, Inc., 10th Cir. 1993, 994 F.2d 1476, is clear. Autoskill won a preliminary injunction against NESS. Six days later NESS filed a voluntary Chapter 11 petition. Commencing the Chapter 11 proceeding constituted an "order for relief." Sixty-six days after the injunction issued and 60 days after the order for relief, NESS filed a notice of appeal. The appeal was timely under 11 U.S.C. § 108(b)(2), which allows 60 days after the order for relief to file any notice that would have been timely if filed when the order for relief entered. The appeal was not timely under the 30-day provision in Appellate Rule 4. The Rule 4 period was established in 1968 when the Appellate Rules first took effect. Section 108(b)(2) was adopted in 1978. But Appellate Rule 4 was amended in 1979. The court looked to the nature of the 1979 amendments and the Committee Note. It found that "[t]he change was made for clarity only and did not change the meaning of the rule." Thus "the two changes that have been made * * * were not substantive, and do not affect our application of § 2072." 994 F.2d at 1485 & n. 8. The statute prevailed; the style change did not alter the pre-Style supersession relationship.

Local 38, Sheet Metal Workers v. Custom Air Systems, Inc., 2d Cir. 2003, 333 F.3d 345, follows the *Autoskill* decision. It agreed that "[a] statute enacted subsequently to a rule * * * trumps the rule." The 1979 Rule 4 amendments did not establish Rule 4 as the more recent enactment: "To be sure, there were minor revisions to Rule 4(a) subsequent to the enactment of § 108(b), but as the Tenth Circuit explained, those changes were not substantive and thus do not affect our analysis." 333 F.3d at 348 n. 2.

U.S. v. Wilson, 5th Cir. 2002, 306 F.2d 231, 235-237, is less clear, but seems to support the same approach. The government appealed a suppression order by notice filed 32 days after the order was signed and dated but only 29 days after the order was entered on the docket. 18 U.S.C. § 3731 set the time for a government appeal at 30 days after the order was "rendered." Appellate Rule 4(b) set the time at 30 days after entry of the order. The court held the appeal timely by applying Rule

4(b). "[W]here a conflict exists between a Rule and a statute, the most recent of the two prevails." Implicit repeal is disfavored in the same way when a Federal Rule is offered to repeal a statute as when a statute is offered to repeal another statute. But there is a difference between "rendering" an order and "entering" an order. "Rule 4(b) trumps § 3731." In reaching this result, the court looked to several sets of dates. "Rendered" was first used in the Criminal Appeals Act long before the Appellate Rules were first adopted in 1968. Section 3731 was most recently amended in 1994. Appellate Rule 4(b) was last amended [by the Style amendments] in 1998. The court expressed its confidence that the Supreme Court considered the conflict between rule and statute in determining that Rule 4(b) would run appeal time from entry of the order. "In any event, the Rules were promulgated after § 3731 was enacted; the Rules, including Rule 4(b), have been amended more recently than § 3731; and, the terms rendered and entered date to the respective establishment of the Criminal Appeals Act and the Rules, the latter being the most recent." Finally, § 3731 itself says that the provisions for government appeals are to be liberally construed. The *Wilson* opinion properly looked to the respective dates on which the conflicting provisions were first adopted. Rule 4(b) with "entry" came after adoption of § 3731 with "rendered," so Rule 4(b) controls. Some ambiguity is introduced by the portion of the opinion that notes the dates of the most recent amendments, even though they did not change the respective and controlling words — and even though the 1998 Rule 4(b) amendment was part of the Appellate Rules Style Project.

Baugh v. Taylor, 5th Cir. 1997, 117 F.3d 197, 201, also reflects the proper approach. This case addressed 28 U.S.C. § 1915(a)(3) and Appellate Rule 24. Section 1915(a)(3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith. Appellate Rule 24 provides that a party denied leave to proceed in forma pauperis on appeal could move for permission in the court of appeals. The Fifth Circuit found no conflict and no supersession, observing that the provision set out as § 1915(a)(3) by amendment in 1996 was in § 1915(a) long before Rule 24(a) was adopted in 1967 "to spell out the procedural

implementation of * * * § 1915. The [1996 statute] merely moved this provision from subsection (a) of section 1915 to subsection (a)(3). We do not view this relocation as evidence of congressional intent to abrogate procedures in Rule 24 that have coexisted peacefully for three decades with the identical provision." Although the setting presented the converse question whether a more recent statute had superseded an earlier Enabling Act rule, the principle is constant. A cosmetic or technical change that does not change meaning does not count in determining whether statute or rule is more recent.

Two cases in one circuit deserve particular attention because of inconsistency with the approach demonstrated in the cases described above. In *Floyd v. U.S. Postal Service*, 6th Cir. 1997, 105 F.3d 274, the court reached a conclusion opposite to the ruling in the *Baugh* case. It found that § 1915(a)(3) was inconsistent with Appellate Rule 24(a) and that as the later in time, § 1915(a)(3) superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir. 1999, 178 F.3d 800, 802-804, the court reversed course because Appellate Rule 24(a) was amended [as part of the Style Project] in 1998, carrying forward without change the provision for moving in the court of appeals for leave to appeal in forma pauperis. The court did not follow the approach of the cases described above and analyze the relationship of the substantive provisions of the statute and rule, or when those substantive provisions became effective. Instead, the court simply stated that Appellate Rule 24 became the newest provision upon its amendment and superseded the once superseding statute. There is no explanation, no recognition of the effect of the fact that the revisions carried forward the rule's meaning without change, and no explanation of the reason for concluding that the supersession relationship should be reversed by a style amendment that was recognized to carry forward the once-superseded meaning.

McConville v. U.S., 2d Cir. 1952, 197 F.2d 680, 682 presented an appeal-time question under then Civil Rule 73(a). "[E]ffective March 19, 1948," Rule 73(a) shortened the time to appeal but also excepted the time to consider such motions as the timely Rule 52(b) motion made in that

case. As measured by Rule 73(a), the appeal was timely. The appeal may not have been timely under the provisions of 28 U.S.C. § 2107 as it stood when Rule 73(a) was amended. Section 2107, however, was almost immediately amended to reflect the Rule 73(a) period but even as amended did not reflect the provision for tolling appeal time. The court first said that the new version of § 2107 should be construed to conform with Rule 73(a) "since the new statute was so obviously 'in conformity with * * * proposed amendment to Rule 73 * * *,' as the Reviser's Note states." But the court went on to say that "the rule was reenacted (with some changes not here pertinent) on December 29, 1948, effective October 20, 1949, and, in accordance with * * * § 2072, supersedes all inconsistent statutory enactments." Although that passage may seem to suggest that any amendment of a Rule establishes superseding effect even though the amendment does not touch an existing inconsistency between the rule and a superseding statute enacted before the amendment, this suggestion is weakened by footnote 1, which adds that an amendment of May 24, 1949, before the effective date of the October 20, 1949, amendment, "had no connection with this issue."

The cases are few in number but seem to support two conclusions. First, the Supreme Court is authorized by the Enabling Act to restyle the Rules to improve and clarify expression, without changing substantive meaning, and to adopt the restyled rules without affecting the supersession relationships between those rules and previously-enacted statutes. This conclusion is squarely supported by the rule that revision and consolidation of laws change their effect only if change is clearly intended.[2] Second, an explicit disclaimer of any supersession effect will be helpful. Such a disclaimer should avoid misapplied supersession analyses that can occur because supersession is so rarely encountered and because it is easier to compare the dates a rule amendment and a statute took effect than to examine the nature and purpose of the rule amendment and to compare the dates

[2] *E.g., Finley v. U.S.*, 1989, 490 U.S. 545, 553-554, 109 S.Ct. 2003, 2009. The 1948 codification of the Judicial Code did not expand supplemental jurisdiction under the Federal Tort Claims Act: "Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.' *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 * * * (1912)."

when the substance of the conflicting rule provision and statute were first enacted. The safer course is some explicit provision to ensure that the Style Project neither expands nor contracts the supersession effects of each rule. The clear effectiveness of the explicit disclaimer in the Criminal Rules Style Project provides a model.

IV. Supersession Provisions

The apparent effectiveness of the explicit disclaimer frames the question for the Civil Rules Style Project: how best to ensure that the December 1, 2007, Style Amendments do not affect the supersession relationships between any Civil Rule and any statute enacted before December 1, 2007.

The easiest to execute would be the addition of language to the Committee Note for each rule stating that the Style amendments do not affect supersession relationships. A second approach would adopt an express rule provision stating that the Style amendments do not affect supersession relationships. A third approach would be to state the proposition in the message transmitting the Style Rules from the Supreme Court to Congress. A combination is also possible, such as a new rule combined with a Committee Note in Rule 1, the Notes for the Rules that are candidates for supersession arguments (such as Rule 11), or all the Committee Notes, referring to the new rule text. Each method has some advantages and also some disadvantages, but the best solution may be to adopt an express rule text and support it by cross-references in Committee Note.

A. Committee Note Approach

The advantage of addressing supersession in Committee Notes is that it is easy to provide a clear statement without worrying about the fine points of rule drafting. There also is some reason to hope that Committee Notes will be an obvious point of inquiry when something as exotic as a supersession question arises. The well-established "later-in-time" approach will in any event require the parties and court to identify the time when the rule provision and statute took effect. It would seem natural to consult the contemporary Committee Note to identify the purpose of the rule or

amendment. Even those who (unfairly) view Committee Notes with the skepticism that often greets legislative "history" should be willing to accept a statement of the Style Project's purposes.

One disadvantage of relying on Committee Notes is that busy courts and lawyers do not always look beyond rule text and statutory language. Another is that a statement in a single Committee Note, whether appended to Rule 1, to Rule 86, or to some other rule, may not be sufficient. The Notes repeatedly admonish that the Style Project does not affect substantive meaning, but the supersession issue is not a problem for every, or even for many, rules.

Any use of Committee Notes to address this issue should include Rule 1. The question is whether to include the Note language in every rule or only in those rules likely to raise the issue, such as Rule 11. The Note language would also be a useful way to distinguish any non-Style Rule or amendment adopted at the same time. For example, if new Civil Rule 5.2 should take effect at the same time as the Style Rules, the Rule 5.2 Committee Note would not have the "Style-only" language. If it seems useful, distinctions also could be made in the Committee Notes for the rules amended on the "Style-Substance" track.

Committee Note language for each of the rules (or for those identified as candidates for raising the issue) can be illustrated as an addition to the language that is standard for each of the Style Rules:

> The language of Rule __ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. <u>As a result, they do not change the effect of this rule in determining whether a law that conflicts with this rule has "no further force or effect" by virtue of 28 U.S.C. § 2072. The rule's effect for this purpose is the same on December 1, 200X as it was on November 30, 200X.</u>

An alternative might be to add a somewhat longer generic statement to the Committee Note

for Rule 1, supplemented by an explicit cross-reference in the separate Committee Note for each rule or for some of the Rules. The Rule 1 Note language might look like this:

> 28 U.S.C. § 2072(b) provides that "All laws in conflict with such rules [adopted under § 2072(a)] shall have no further force or effect after such rules have taken effect." The style changes made in Rule 1 and in each of the other Civil Rules are stylistic only and do not change the effect of the Civil Rules on any other law. The existence of conflict is determined as of the original effective date of the substantive provision that raises the conflict question.

Still another alternative would be to adopt express rule text and then add a brief cross-reference either in Committee Note 1 or in all or some of the Committee Notes: "As stated in Rule 86(b), these changes do not affect the supersession relationships between this rule and any conflicting laws."

B. Rule 86(b)

A provision negating any supersession effects from the Style amendments could be added to an existing rule or could become a new separate rule. An express rule provision has at least two advantages. One is that there can be no quibbling about the authority of a mere Committee Note. A second is that the Committee Note to a new rule provision could be somewhat more elaborate than a common statement included in all or some Committee Notes. Candidates that have been suggested from among the current rules include Rules 1, 81, and 86. Of these, Rule 86 seems the most likely. It deals with effective dates and the effect of amendments on pending actions. A "no-new-supersession" provision essentially says that earlier effective dates control for supersession purposes. That logical connection may not actually draw many readers to Rule 86, but it may bolster the case for Rule 86 over competing candidates. A separate rule could be used as an alternative. The most attractive locations are likely to be up front, as a new Rule 1.1, or at the very end as a new Rule 87. The model sketched here is framed as a new Rule 86(b):

Rule 86. Effective Dates.

(a) ***Effective Dates.*** These rules * * *.

(b) ***December 1, 2007 Amendments.*** The amendments adopted on December 1, 2007 do not change the date on which any provision that conflicts with another law took effect for purposes of 28 U.S.C. § 2072(b).

Committee Note

The language of Rule 86 * * *.

The subdivisions that provided * * *.

Rule 86(b) is added to express the relationship between the [general] restyling of all the Civil Rules and other laws. The amendments adopted on December 1, 2007 take effect on that date for all purposes other than comparing the effective dates of a rule and another law that conflicts with the rule. These amendments do not change the meaning of any rule, except new Rule 5.2 which was first adopted on December 1, 2007. If there is a conflict, the portion of the rule that conflicts with another law took effect on the day that part of the rule was first adopted. A conflict between any rule other than Rule 5.2 and another law should be resolved under 28 U.S.C. § 2072(b) on December 1, 2007 in the same way it would have been resolved on November 30, 2007. Amendments adopted after December 1, 2007, will be treated in the same way as amendments adopted before then.

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As noted, a complicating drafting issue arises from the expectation that new Rule 5.2 will take effect on December 1, 2007. It is important to keep Rule 5.2 on the same schedule as the E-Government Act provisions in the Appellate, Bankruptcy, and Criminal Rules. The supersession effect of Rule 5.2, in its initial form, will be measured from December 1, 2007. The Rule 86(b) draft is intended to accommodate this difficulty in stating that the December 1, 2007 "amendments" do not "change" the effective date. The Committee Note is explicit. It would be possible to add an explicit exception for Rule 5.2 in the rule text: "The amendments adopted on December 1, 2007, except for [new] Rule 5.2, do not change * * *"; or perhaps at the end: ", but Rule 5.2 takes effect on December 1, 2007."

C. Supreme Court Message

A third method of addressing supersession is to include a statement in the message that transmits the Style Rules from the Supreme Court to Congress. This method is not likely to prove effective as the sole means of making the point. It seems likely that more than a few lawyers and judges will not think to look for the message, particularly as the Style Rules come to be viewed as

the way the Rules always have been. But it could be a wise precaution to repeat the no-supersession point in the Court's message. The message would reassure Congress that there is no intent to smuggle through any clandestine amendments of statutory procedure.

V. Conclusion

The Supreme Court has authority to restyle the rules to improve expression and achieve easier, more consistent, and better application. Style changes do not affect the supersession relationships between the few rules that may conflict with statutes. The best way to foreclose arguments that the Style Amendments change the supersession effect of a rule is by express rule language. A new Rule 86(b) will foreclose uncertainty — on and after the date of adopting the Style amendments the Civil Rules will have the same relationship to conflicting statutes in force on the date of adoption as they had the day before adoption.

Appendix: Authority to Avoid Supersession

Section 2072 establishes rulemaking authority and decrees that a § 2072(a) rule supersedes a conflicting law. It can be claimed that the supersession provision takes the question out of the Supreme Court's hands — that if there is a conflict, a later-adopted rule must supersede an earlier statute no matter what the Court intends. The Court, on this view, must take the Enabling Act as an integrated whole that denies authority to adopt a rule that does not supersede.

The better view is that the Supreme Court can decide whether an Enabling Act rule supersedes an inconsistent statute. The Civil Rules themselves include several provisions illustrating this point by expressly providing that a rule operates unless "a statute provides otherwise."

So too the Court should have authority to amend one part of a rule without expanding the supersession effect of other parts. Rule 11 can be used as an example. Present Rule 11(c)(1)(A) provides a "safe harbor" period of 21 days to withdraw or correct a challenged position. It is possible that consideration of this period in the Time Project might lead to a conclusion that the period should be 14 days or 28 days. If Rule 11 were amended solely by substituting "14" or "28" for "21," there would be no reason to conclude that all of Rule 11 takes effect anew, reversing the supersession effects of statutes adopted between the next-most-recent version and the new rule. It would be impossible to live with such supersession consequences. Surely the answer is that supersession is measured by the effective date of the first amendment that added the rule provision that conflicts with a statute. Nor should the answer depend on the form chosen for adopting the amendment. A mere change in the number of days for the safe harbor likely would be published and adopted without setting out all of Rule 11, nor even all of Rule 11(c). But there is no clear formula for determining how much of a rule is published to show the place and effect of a proposed amendment. The choice is made by looking for sufficient context to illustrate the amendment, and may be affected by a desire to make other small adjustments (including style improvements) at the same time. These expository choices should not be constrained by fear of unintended supersession

consequences.

The same conclusion holds for style amendments. The clear intent to carry forward present meaning mandates that the same meaning have the same supersession consequences. The Style Project cannot be made impossible by the assertion that on the effective date the entire set of Civil Rules supersedes any conflicting law that until then had superseded a Civil Rule. The Supreme Court's authority to implement the intent to achieve supersession neutrality inheres in the language, purpose, and structure of the Enabling Act.

The Enabling Act reflects a sturdy accommodation of congressional and judicial responsibilities. Congress has the authority to create the inferior federal courts, and with that the authority to regulate most matters of procedure. But this is the authority to create "courts," vested with some part of the "judicial power." The courts have some measure of inherent responsibility to function as courts acting to discharge a judicial power. Congress could not, in the name of reducing cost and delay, direct that cases be decided by tossing a coin. Apart from whatever modest constraints these concerns may impose on legislative regulation of judicial procedure, the courts have real advantages in developing and implementing rules of procedure. The central feature of the Enabling Act is the supervised delegation of rulemaking authority, subject in the first instance to acquiescence by Congress and further subject to congressional revision.

Supersession reflects a special element in this delegation. The central purpose has been to ensure that an Enabling Act rule that first undertakes to establish procedure in a particular area will displace statutes that had been necessary before then. Examples are provided by the initial Civil Rules,[3] the Appellate Rules,[4] the merger of the Admiralty Rules into the Civil Rules,[5] and such

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[3] Penfield Oil Co. v. §, 1947, 330 U.S. 585, 589 & nn 4, 5, 67 S.Ct. 918, 920-921 & nn. 4, 5.

[4] *American Paper Institute v. ICC*, D.C.Cir.1979, 607 F.2d 1011; *Griffith v. NLRB*, 9th Cir.1977, 545 F.2d 1194, 1197 n. 3; *Feeder Line Towing Serv. v. Toledo, Peoria & Western R.R.*, 7th Cir.1976, 539 F.2d 1107, 1108-1109; *Motteler v. J.A. Jones Constr. Co.*, 7th Cir.1971, 447 F.2d 954; *Jack Neilson, Inc. v. Tug Peggy*, 5th Cir.1970, 428 F.2d 54, 55; *Waterman S.S. Corp. v. Cottons*, 9th

specific matters as the 1951 adoption of Civil Rule 71A to establish uniform condemnation procedures in place of a welter of statutory provisions.[6]

Other supersession questions arise from court rules that are not part of a generalized program to substitute court rules for a procedural system generally governed by statutes. *Henderson v. U.S.*[7] is the leading Supreme Court example. The 1920 Suits in Admiralty Act directed that service be made "forthwith" on the Attorney General and the United States Attorney. In 1982 Congress enacted its own Rule 4 amendments as part of a package designed to transfer service obligations from the marshals to plaintiffs. The version in effect at the time of service in the *Henderson* case, then Rule 4(j), allowed 120 days for service and authorized an extension for good cause. Henderson served the Attorney General 47 days after filing, and — after obtaining a good-cause extension — served the United States Attorney 148 days after filing. Finding that at least the 148-day period was not "forthwith," the Court held that Rule 4(j) superseded the Act. The central point of dispute focused on the question whether service forthwith was a condition of the United States' waiver of immunity; the Court ruled that it was not. Going on to find an irreconcilable conflict, the Court further concluded that Rule 4(j), "as is the whole of Rule 4," is "a nonjurisdictional rule governing 'practice and procedure', * * * rendering provisions like the Suits in Admiralty Act's service 'forthwith' requirement 'of no further force or effect,' § 2072(b)." There is one special twist in the decision.

Cir.1969, 419 F.2d 372; *Albatross Tanker Corp. v. S.S. Amoco Delaware*, 2d Cir. 1969, 418 F.2d 248.

[5] *Hansen v. Trawler Snoopy, Inc.*, 1st Cir.1967, 384 F.2d 131, 132. (Several of the cases cited in note 4 above involved supersession by Appellate Rule 4 of statutory appeal-time provisions for admiralty cases. The shift from focus on former Civil Rule 73(a) in the *Trawler Snoopy* case reflects the short interval between the 1966 merger of admiralty practice into the Civil Rules and the 1968 effective date of the Appellate Rules.)

[6] *See Kirby Forest Indus., Inc. v. U.S.*, 1984, 467 U.S. 1, 4 n. 2, 104 S.Ct. 2187, 2191 n. 1; *U.S. v. 93.970 Acres of Land*, 1959, 360 U.S. 328, 333 n. 7, 79 S.Ct. 1193, 1196 n. 7; *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693; *Southern Nat. Gas Co. v. Land, Cullman Cty.*, 11th Cir.1999, 197 F.3d 1368.

[7] 1996, 517 U.S. 654, 116 S.Ct. 1638.

Although the passage just quoted seems to rely directly on § 2072(b), the Court recognized in an earlier passage that Rule 4(j) "was not simply prescribed by this Court pursuant to the Rules Enabling Act. * * * Instead, the Rule was enacted into law by Congress * * *. As the United States acknowledges, however, a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes."[8]

Many of the remaining cases involve claims that a statute has superseded a court rule. In that setting the Supreme Court has referred to "the necessary clear expression of congressional intent" to supersede.[9] Lower courts frequently look for a "clear statement,"[10] and refer to a presumption that court rules apply.[11] Calls for "clear statement" also appear in decisions dealing with arguments that a rule has superseded a statute.[12]

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[8] The Court then quoted the brief for the United States: "'We agree * * * that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction with Rule 4(j) and its interaction with other laws.'" 517 U.S. at 668-669, 116 S.Ct. at 1646.

[9] *Califano v. Yamasaki*, 1979, 442 U.S. 682, 698-701, 99 S.Ct. 2545, 2556-2558 (a class action may be maintained under Civil Rule 23 for review of determinations that Social Security benefits were overpaid; the statute does not impliedly preclude this procedure).

[10] *Jackson v. Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136 (PLRA supersedes in part Appellate Rule 24; even absent a clear statement, irreconcilable conflict requires that a later statute be followed); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 7th Cir.1986, 800 F.2d 641; *Gaubert v. Federal Home Loan Bank Bd.*, C.A.D.C.1988, 863 F.3d 59, 67; *Grossman v. Johnson*, 1st Cir.1982, 674 F.2d 115, 118-123; *U.S. v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 10th Cir.1970, 427 F.2d 539 (The requirement in 42 U.S.C. § 2000e-6(a) that complaint set forth facts pertaining to a pattern or practice of resistance to the full enjoyment of statutory rights "ought to be construed to harmonize with the Rules, if feasible"; compliance with the notice-pleading standards of Civil Rule 8 suffices, in part because an insistence on fact pleading would "directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading").

[11] "There is a firm presumption that the Federal Rules of Civil Procedure apply in all civil actions * * *." *Walsh v. Ford Motor Co.*, D.C.Cir.1986, 807 F.2d 1000, 1009 (the Magnuson-Moss Warranty Act's protective policies do not warrant departure from the class-certification standards in Civil Rule 23); *Weiss v. Temporary Inv. Fd.*, 3d Cir.1982, 692 F.2d 928, 936, vacated on other grounds 1984, 4365 U.S. 1001, 104 S.Ct. 989.

[12] *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278 (no clear statement, but Appellate Rule 24 and the PLRA "are not reconcilable" — recall that after Appellate Rule 24 was renewed by the 1998 Style amendments, the court concluded that the supersession was reversed, *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800).

Not surprisingly, many of the cases dealing with seeming conflicts between a court rule and a statute invoke the "implied repeal" approach to reconciling seemingly inconsistent statutes. In rejecting an argument that Civil Rule 54(d) establishes authority to award costs beyond those authorized by statute, the Supreme Court invoked the familiar axiom that "[r]epeals by implication are not favored."[13] Lower courts offer the same advice.[14]

These general approaches leave open fascinating questions whether general "implied repeal" approaches should extend to potential conflicts between court rules and statutes. The delicate relationships established by the Enabling Act delegation from Congress to the Supreme Court surely require independent analysis before settling on an overall approach.[15] Because the outcome for the Style Project is so clear, a bare sketch should suffice here.

The first difference from an assertion of a conflict between two statutes is that the court rules flow from a particularly constrained source of authority. The rule must be a "general rule[] of

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[13] *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 1987, 482 U.S. 437, 442, 107 S.Ct. 2494, 2497-2498.

[14] *U.S. v. Wilson*, 5th Cir.2002, 306 F.3d 231, 237: The court generally disfavors implicit amendment or repeal of statutes, but where there is irreconcilable conflict, "'the later act to the extent of the conflict constitutes an implied repeal of the earlier one.' * * * We thus view a Federal Rule of Appellate Procedure the same way that we do a federal statute."

Jackson v. Stinnett, 5th Cir.1996, 102 F.3d 132, 135: "The second limit on Congress's power to amend the Rules is the general disfavor with which we view implicit amendment or repeal of statutes."

"Repeals by implication are not favored by the courts." *Floyd v. U.S. Postal Serv.*, 6th Cir.1997, 105 F.3d 274, 278.

"Although repeals by implication are not favored, we do not believe that Congress must explicitly state that a procedural rule is superseded in order to 'clearly express' that proposition." The Multiemployer Pension Plan Amendments providing for prompt payment of withdrawal assessments establish a system that supersedes the stay by supersedeas bond provisions of Civil Rule 62(d).

[15] Three articles provide helpful perspectives. A fascinating exchange is provided by Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281 and Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 1012. A more recent article, delving deeply into supersession analysis, is Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 2002, 51 Emory L.J. 677.

practice and procedure" or "evidence," and it must not "abridge, enlarge or modify any substantive right." Even a rule that in most applications is a valid general rule of procedure may fail to supersede a particular statute because it would affect a substantive right established by the statute.[16]

The limits on the Enabling Act's delegation relate to a more complex set of questions. The relationships between subsequent Congresses (and for that matter within a single Congress) are a continuum of the same legislative powers. In the Enabling Act Congress expressed a special respect for the distinctive capacities and procedures the judiciary can bring to bear in developing rules of procedure. In return, the judiciary must show special respect for statutes. The question whether a later statute supersedes a court rule is not quite the same as the question whether a later court rule supersedes a statute. Judge Easterbrook, for example, has rejected reliance on the general disfavor of repeals by implication:

> The Rules of Civil Procedure * * * cannot "repeal" any statute; the Constitution does not give the Judicial Branch any power to repeal laws enacted by the Legislative Branch. But Congress itself may decide that procedural rules in statutes should be treated as fallbacks, to apply only when the rules are silent. And it has done just this, * * * in what has come to be called the supersession clause of the Rules Enabling Act * * *[17]

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[16] A clear example is *Durant v. Husband*, 3d Cir.1994, 28 F.2d 12, 15. The Virgin Islands Tort Claims Act waives sovereign immunity, but the waiver is conditional. One condition is that no judgment by default can be entered against the government. "To the extent that the Virgin Islands waiver of sovereign immunity is flatly conditioned on the non-availability of a default judgment, the matter is one of substance and not procedure. Applying Rule 55(e) to permit default judgments against the Virgin Islands government in the present case would significantly 'enlarge' the substantive rights conferred on claimants under section 3411(a) of the Tort Claims Act."

The same thought was expressed in *U.S. v. Microsoft Corp., D.C.Cir.*1999, 165 F.3d 952, 959-960. The court concluded that there is no conflict between the discovery protective-order provisions of Rule 26(c)(5) and the Publicity in Taking Evidence Act of 1913. But it observed that a statute is superseded by a later conflicting court rule "unless such supersession would 'abridge, enlarge or modify [a] substantive right.'"

[17] *Northern Border Pipeline Co. v. 64.111 Acres of Land*, 7th Cir.2003, 344 F.3d 693, 694.

A similar view may be implied in *U.S. v. Kim*, 9th Cir.2002, 298 F.3d 746, 748-749. After finding that the appeal-time provisions of Appellate Rule 4(b) are inconsistent with and supersede the provision in 18 U.S.C. § 3731, Judge Noonan concluded: "The Rule trumps the statute. No conflict exists because § 2072 has abolished it." Here too reliance is placed on one Act of Congress to supersede another — albeit the superseding statute, § 2072, may have been enacted first and

A somewhat similar thought was expressed in characterizing implied repeal as arising not from conflict between the court rule and a later statute but from conflict between the Enabling Act and the statute that conflicted with an earlier rule.[18]

As a further complication, there is some lingering uneasiness about the Enabling Act structure that enables a rule prescribed by the Supreme Court to supersede an earlier statute without any affirmative act by Congress. This delegation is more than a delegation of Congressional authority because it excludes the President from the process — there is no bill enacted by House and Senate and presented to the President.

These considerations suggest at least two observations. Although a conflict once found is resolved by the later-in-time rule, the distinctions between legislating and rulemaking may require different approaches in determining whether there is a conflict. The courts have special responsibility for, and control over, the meaning of court rules. Even when rule and statute clearly affect only procedure — when the statute does not establish a specific substantive right that must not be abridged, enlarged, or modified — the courts may, by construction, subordinate a later rule to an earlier statute more readily than they would subordinate a later statute to an earlier rule.

For present purposes, it is more important to consider the respect the Enabling Act process should show for statutes as court rules are developed and amended. The authority to supersede a statute should be exercised with great care. The best cases for supersession will involve matters that are clearly and purely procedural. Supersession may be further supported when confronting a statute embodying antiquated concepts of procedure, or when there is a need to establish uniform procedure in face of a welter of disparate statutory procedures, or when experience shows a clearly better way

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negates future legislation only through the mediating direction of an Enabling Act rule.

[18] *Jackson v.Stinnett*, 5th Cir.1996, 102 F.3d 132, 135-136: "To the extent that the Rules Enabling Act (as expressed in [Appellate] Rule 24(a)) actually conflicts with the PLRA, we hold that the statute repeals the Rule."

of doing things.

The responsibility to respect statutes carries with it authority to expressly disclaim supersession. An intent not to supersede controls.[19] If there is any apparent reason to defer to a known statute, or to a concern that there may be unknown or future statutes, disclaimer can be accomplished by qualifying a general rule by such terms as "unless a statute provides otherwise." But such terms are not always possible. The Style Project demonstrates the need to implement a no-supersession intent by other means. The Supreme Court must be able to improve the drafting of the Civil Rules, as it has done for the Appellate Rules and the Criminal Rules, without changing their meaning and without affecting existing supersession consequences.[20] That is the intent of the Project. The difficult task that remains is to identify the best means of implementing that intent. Part IV provides beginning sketches but should not deter efforts to develop more creative solutions.

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[19] "[T]he first inquiry should be to determine the intent of the Court and Congress in the particular case and to harmonize to avoid an irreconcilable clash of Court and congressional authority if possible." Genetin, 51 Emory L.J. 677, 732, note 16 above.

[20] A parallel to the Style Projects may be found in 1987, when 58 Civil Rules and four Supplemental Rules were amended to make them gender-neutral. The 1987 Committee Notes say blandly: "The amendments are technical. No substantive change is intended." There is no indication that anyone thought that those amendments created new effective dates for supersession purposes.

Summary of Comments

The written comments on Style Rules 1-86, the Style-Substance Rules, and the Style Forms, are described in the Summary of Comments. The hearing on November 18, 2005, and discussion at the Committee meeting that followed, are described in the Notes on the meeting.

SUMMARY OF COMMENTS: STYLE RULES

(Two of the most detailed sets of comments are identified without repeating the full CV designation each time. One set, 05-CV-22, was submitted by Professor Stephen B. Burbank and Gregory P. Joseph, Esq., on the basis of work done by a 21-person working group, is identified simply as "Burbank-Joseph." Similarly, 05-CV-008, submitted by the Committee on Civil Litigation of the United States District Court for the Eastern District of New York, is identified as "EDNY.")

The summaries are at times embroidered by responses. Although this approach is new to the task of summarizing comments, the Style Project presents some issues that may benefit from counterpoint.

Overall Project

Hon. W. Eugene Davis, 05-CV-007: Judge Davis chaired the Criminal Rules Advisory Committee during the style revision project. He opposed the project while the decision to go ahead was deliberated, fearing that "we would make inadvertent, substantive changes or create ambiguities that would result in wasteful, satellite litigation." But the fears "turned out to be almost totally unfounded. We have experienced minimal litigation over the meaning of the style changes. Judge Will Garwood, who was Chair of the Appellate Rules Committee during their style revision project, also tells me that satellite litigation over the meaning of the changes to those rules has not been a problem." "I have every reason to believe that the concern about significant satellite litigation over the meaning of the changes to the Civil Rules will turn out to be just as unfounded as it was with the Criminal Rules."

EDNY: Review of the Burbank-Joseph comments led to an independent consideration of the costs of the style enterprise. "[T]he unanimous judgment of every member of the Committee who expressed a view" was that "the costs and other disadvantages of the style revision project outweigh its benefits." First, there is the risk of unintended consequences. After finding a number of ambiguities and apparent substantive changes, review of the Burbank-Joseph report found that they had uncovered many more — and that there was almost no overlap, suggesting that "there remain a significant number of unintended consequences that neither we nor [they] have spotted." Second, any style revision will bring "disruptions." "[T]he sheer magnitude of the rewording and subdivision of rules that have become familiar to the courts and the profession in their present form will complicate research and reasoning about the rules for many years to come." Third, courts and the profession will be so occupied "in digesting the style revisions" that it will be more difficult to accomplish desirable substantive rules revisions. It would be better to implement style revisions of particular rules or groups of rules "as the need for substantive changes in those rules or groups of rules becomes apparent."

Prof. Bradley Scott Shannon, 05-CV-009: "The non-substantive problems associated with the Federal Rules of Civil Procedure are sufficiently great so as to warrant revision. Overall, the Advisory Committee has done a fine job in this regard, and the restyled rules as proposed, whatever their flaws, are superior to the Rules as they currently exist."

Plain Language Action and Information Network (PLAIN), 05-CV-010: "This draft is a tremendous improvement over the current version. It will be easier to use, and thus should save time and effort, and achieve a higher degree of conformance with the procedures it outlines."

Hon. Peter D. Keisler, Assistant Attorney General, 05-CV-011: In the judgment of the United States Department of Justice "the revisions should help simplify and clarify the text of many of the Rules so that practitioners can better understand and apply them." Attorneys in the Criminal Division and in the Civil Division's appellate staff have found that the style changes in the Criminal Rules and Appellate Rules "have been positive and beneficial. the Department strongly supports the current initiative to restyle the Civil Rules * * *."

Susan Kleimann, President Kleimann Communications Group, 05-CV-012: The style amendments "will make it easier for judges, lawyers, and the public to find the information they need, understand what they find, and be able to use that information effectively."

Lawyers for Civil Justice, 05-CV-014: "Plain language is critical to clear understanding and our reading of the Style Revisions convinces us that lawyers and litigants will save lots of time and trouble in reading and interpreting these rules, if they are adopted. * * * Increased clarity will bring about easier and faster understanding of the Rules and dealings among lawyers will be simplified and facilitated." LCJ disagrees with those who believe the changes are not worth the effort. "Similar claims were made about the re-styling of the Criminal and Appellate Rules, but those have been on the books for some time and appear to have worked well in practice."

John Beisner, Esq. 05-CV-015: The restyled rules attempt to minimize the frequent debates about the meanings of even familiar Civil Rules, "to ensure that our federal judicial rules provide a clear roadmap to litigating in our federal courts — rather than construct a trap for the unwary." Simplifying the rules "will also increase attorney efficiency and even has the potential to reduce ever-escalating attorneys' fees. One study conducted in Australia found that on average, lawyers are able to arrive at a solution 30 percent faster when they consult plain versions of legislation versus traditionally styled legislation. See Law Reform Comm'n of Victoria, Plain English and the Law 69-70 (1987)." "[T]he restyling * * * reflects a broadly-based, overdue realization by public and private entities that simpler is better."

Some comments suggest that the Style Project will interfere with the more important need "to rewrite the rules for 21st Century legal practice. * * * I believe that these concerns are ill-founded." There is no apparent present plan to convene a "Constitutional convention" to rewrite the Civil Rules from scratch. The wisdom of any such project is questionable. Some of the rules are controversial, but gradational change is better than wholesale change. And in any event, a sweeping revision of the whole system would take many years, if not decades. "It makes no sense to force attorneys to litigate under potentially confusing rules for several years simply because a more ambitious project is being planned that could easily take many years to implement." Indeed, by making the rules clearer the style project will save attorneys time, not waste their time by forcing them to relearn a new set of rules and then put aside the new learning for a still newer set of rules.

Hon. Thomas S. Zilly, Advisory Committee on Bankruptcy Rules, 05-CV-016: "The restyling significantly improves the Civil Rules both as to their clarity and readability."

Donald P. Byrne, Esq., 05-CV-017: After a career writing FAA regulations as Assistant Chief Counsel for Regulations, finds the revised rules "a great improvement in communication, especially for lawyers like me who refer to the Civil Rules only occasionally. They're easier to read, digest, and remember." It was a challenge to get through the original rules. "The proposed style revisions make the ride much smoother and the road map much clearer."

ABA Section of Litigation, 05-CV-018: The Litigation Section Council has not taken a position on the Style Rules, but notes the honor and privilege of enjoying the opportunity to participate in the style process through two members assigned to assist in the project and through the Section's liaison to the Advisory Committee. The Committee responded to countless questions raised by these Section representatives.

Committee on United States Courts, State Bar of Michigan, 05-CV-019: "The amendments will enhance the readability, internal consistency and organization of the Federal Rules."

Hon. Bill Wilson, 05-CV-020: Writes in response to the doubts expressed by the EDNY committee. Judge Wilson was a member of the Style Subcommittee when the restyling of the Criminal Rules began. The same objections to restyling were voiced then. "The legal profession has traditionally been very conservative about changes (style or substantive) to any rules with which members of the profession have worked. I am satisfied that plain, simple language is to be preferred." "We need rules so plain that practicing lawyers can understand them. In fact, we ought to make them so plain that even judges can understand them. I urge full steam ahead on this restyling project and others."

Patricia Lee Refo, Esq., and Scott J. Atlas, Esq., 05-CV-021: Scott Atlas and Patricia Refo are past chairs of the ABA Section of Litigation and both were members of the Burbank-Joseph Committee. "In our view, the potential benefits outweigh any conceivable transaction costs. The revised rules represent a significant improvement over the existing rules in terms of resolving ambiguities to conform to clear case law and using plain English so that younger and less experienced federal court practitioners can more easily comprehend the text. We have long thought that the language used in the original rules has outlived its usefulness and that practitioners would be better served by a more straightforward text. The Restyling Project accomplishes this goal."

Burbank-Joseph: "[A] number of members favored continuing the effort." They thought the restyling of other sets of rules had been successful. They agreed that there will be some unintended changes in meaning, but noted that this Committee's comments and others will reduce the number. They conclude that such disadvantages are outweighed by the advantages in greater accessibility of the restyled rules, "particularly to younger and less experienced practitioners." But "[a] greater number of participants were either mildly or strongly negative." The Committee found a number of serious problems, and there may be many more that have not been identified. Whatever benefits may be realized "will pale in comparison with the transaction costs, not just those engendered by uncertainty about a change in meaning, but those generated by the need to learn the new rules (and pay for the new treatises), together with the additional transaction costs that will follow when local rules and standing orders are changed to conform to the restyled rules." Beyond these costs, restyling "might retard or make more difficult the more important task of determining whether we have an appropriate set of rules for litigation in the twenty-first century." It would be better to include restyling as one component of the substantive enterprise — "the bar would not tolerate having to relearn the rules more than once in a generation." Finally, Burbank and Joseph themselves are concerned with problems that "have negative implications for access to court (e.g., Rule 68) and/or for the protection of individual rights (e.g., Rule 65) * * *."

Federal Magistrate Judges Assn., 05-CV-024: "The FMJA supports the proposed restyling of the Civil Rules. The proposed style revisions improve the Civil Rules both as to their clarity and readability."

Council of the ABA Section of Litigation Resolution, April 2006: The Council unanimously adopted this resolution: "Resolved, that the ABA Section of Litigation applauds the Judicial Conference Advisory Committee on Federal Rules of Civil Procedure for its extraordinary efforts on the Restyling Project to modernize the Federal Rules of Civil Procedure without changing their substantive meaning. Success in this effort would be an important service to the Bench, Bar, federal court litigants, and the American public."

Rules 1, 2

Burbank-Joseph: We wrestled with the addition of "proceeding" to Rule 1. It would be possible to take up the suggestion by expanding Rule 2: "There is one form of action or proceeding — the civil action." But that would make a petition to perpetuate testimony, for example, a "civil action." Another possibility would be to rescind Rule 2 — the forms of action are dead and their graveyard influence is limited to substance, not procedure. Rule 2, however, has a dedicated constituency and there is little need to court opposition. The only obvious choice is to delete "and proceedings" from Rule 1, as well as "and proceeding" at the end. The difficulty is that the Civil Rules do apply to many events that are difficult to describe as a "civil action." "[a]nd proceeding" was adopted as one example of the theory that a Style Rule can properly describe something that the present rule means — "suits of a civil nature" may be even more restrictive than "civil action." No recommendation on this one.

Rule 4(c)

Alan B. Morrison, Esq., 05-CV-003: (1) * * * ~~A summons must be served with a copy of the complaint.~~ The plaintiff is responsible for having the summons and a copy of the complaint served * * *."

Rule 4(d)

Burbank-Joseph: For Rule 4(d)(1)(D): The comment on Rule 5 adds a note on Proposed Style Form 5 pointing out that we must change the reference to Official Form 1A.

EDNY: Suggests that (d)(1)(F), (d)(2), and (d)(3) be made parallel — now, only (d)(2) calls on the defendant to sign the waiver as well as to return it. ("sign" does not appear in any of the parallel parts of present Rule 4(d). Form 1A repeatedly calls on the defendant to sign the waiver. The most important place to include "sign" in the rule text is (d)(2). It seems an even choice whether to add it to (d)(1)(F) and (d)(3).)

Rule 4(e)

Burbank-Joseph: This is a neat point. The idea that "dwelling house" does not encompass an apartment, condominium that does not stand alone, mobile home, or the like, seems quaint today. But it is possible that the original intent is that there is only one suitable place — only if the defendant does not have a "dwelling house" can a "usual place of abode" be the place of leaving process. Today the central question is whether alternatives are desirable — should we have to worry whether the summer home or the winter home is the "dwelling" or "usual place"? At least if the answer seems a bit more clear than the comment lets on, we might adhere to the Style version.

Rule 4(i)

Prof. Bradley Scott Shannon, 05-CV-009: The letters a should be capitalized in United States Attorney and Assistant United States Attorney — see (i)(1)(A)(i) and (ii).

Rule 4(k)

Alan B. Morrison, Esq., 05-CV-003: (2)(A): "the defendant is not subject to jurisdiction in the ~~any state's~~ courts of general jurisdiction of any state; * * *." "State's" is ambiguous here.

Rule 4(m)

Alan B. Morrison, Esq., 05-CV-003: Style Rule 15(c)(1)(C) allows relation back as to a new defendant if the new defendant received notice of the required quality "within the period provided by Rule 4(m) for serving the summons and complaint." This carries forward a perplexity that exists in the present rules. Rule 4(m) does not apply to service abroad. The conclusion may be that relation back is not permitted as to a defendant who would have to be served abroad. This could be fixed by revising 4(m): "Except in calculating the time limits under Rule 15(c)(1)(C), ~~T~~this subdivision does not apply to service in a foreign country * * *."

Rule 4.1(b)

Prof. Bradley Scott Shannon, 05-CV-009: Although present Rule 4.1(b) refers only to a "decree or injunction," it might be better to substitute "order" for "decree," or perhaps to use all three words — "order, decree, or injunction." [This may risk a substantive change — contempt is an available sanction for failure to obey a discovery order, but it is not clear whether "decree" should be read to include discovery orders or other procedural orders enforceable by contempt.]

Rule 5(a)

Jack E. Horsley, Esq., 05-CV-002: This one is puzzling. It suggests adding "briefs and excerpts from the record" following "record on appeal." But "record on appeal" appears only in the present rule. It was omitted from the Style Rule because Appellate Rule 10 is a self-contained provision for the record on appeal, including service. Perhaps this is a suggestion to restore "designation of the record on appeal" to the Style Rule.

Rule 5(b)

Burbank-Joseph: Rule 5(b)(2)(B)(ii): This does seem to be the same as Rule 4(e) above. (4B Federal Practice & Procedure: Civil 3d, § 1147, p. 445, says that the dwelling house or usual place of abode words have seldom been interpreted for Rule 5; Rule 4 precedents should be useful.)

Burbank-Joseph: Rule 5(b)(2)(D): The comment seems to be right. The present rule allows service by leaving a copy with the clerk only if the person "has no known address." Those words imply some obligation to attempt to find an address. The Style version, "if the person's address is unknown," does not carry that implication as forcefully. (Section 1147, pp. 445-446, is not helpful; it simply observes that Rule 11 signature requirements make it unlikely that there will be no known address. Compare the "if any" question put to Rules 11 and 26(g) on the Style-Substance Track.)

Rule 5(d)

Prof. Bradley Scott Shannon, 05-CV-009: Present Rule 5(e) allows a paper to be filed with "the" judge." Style Rule 5(d)(2)(B) allows filing with "a" judge. It is not clear whether the present rule allows filing only with the judge assigned to the action. The Style Rule seems to allow filing with any judge — indeed, it is not limited on its face to a judge of the court where the action is pending. The Rule should be made clear. [4B FP&P § 1153 notes that the purpose of filing with the judge is to permit immediate action in pressing circumstances. There may be situations in which action could properly be taken by a judge not assigned to the case. For that matter, it is conceivable that not every case will have been assigned to a judge when the need for action arises — indeed, individual docket systems may not persist forever.]

Rule 6(b)

Prof. Bradley Scott Shannon, 05-CV-009: Rule 6(b) says "may or must"; Rule 6(d), says "must or may." The same sequence should be followed in both.

Rule 6(c)

Jack E. Horsley, Esq., 05-CV-002: "must be served at least 5 days and not more than 10 days Before the time specified for the hearing * * *." This would "put a closure" on the time.

Rule 7(a)

EDNY: The response to a counterclaim should be referred to as a "reply," not as an "answer." A change from the historic usage would "engender unnecessary confusion." (The Style version, by characterizing the response to a counterclaim as an "answer," enables the court to order a reply to the response. The present rule does not authorize an order to reply to a reply. The change was deliberate.)

Burbank-Joseph: Rule 7(a)(7): There are two comments. The first is straight-forward. Present Rule 7(a) says there shall be "a third-party answer." Style 7(a)(6) changes this to "an answer to a third-party complaint." Because all first-response pleadings are now called "answer," it is redundant to refer to a third-party answer in 7(a)(7), which should be: "(7) if the court orders one, a reply to an answer ~~or a third-party answer~~." That seems right.

The second is not as clear. "[T]his" proposed change is a change of meaning and should be included in the style-substance track. It is not entirely clear which change is meant — the present rule explicitly authorizes an order to reply to a third-party answer. Changing the description from "third-party answer" to "answer to a third-party complaint" hardly seems to count. The idea probably is that present Rule 7 does not explicitly authorize the court to order a reply to an answer to a counterclaim because it characterizes the response to a counterclaim as a "reply," not an "answer." That does seem to be a change, at least on quick reading of 5 FP&P Civil 3d §§ 1183-1188. But the purpose of the change is evident — as observed in § 1184, a counterclaim is equivalent to a complaint, and an answer is as important as an answer to a complaint even if it is called a "reply." So a response to the answer may be just as useful as a response to an initial answer. At this point in the process, redescribing this as a "style-substance" point is likely to make a difference only if a distinction is drawn in dealing with supersession questions. And even then it makes a difference only if there is some statute out there that might be superseded; it may be safer to treat it as a matter of style so that there is no possible supersession effect.

Rule 7.1

Burbank-Joseph: Rule 7.1(a): The tag line should be "Who Must File: Contents." This is pure style, but looks good.

Rule 8(a)

Burbank-Joseph: Rule 8(a)(3): The suggestion is to restore words from the present rule: "a demand for judgment for the relief sought." It is urged that "judgment is surely an integral part of the relief sought in any action." This seems pure style.

Rule 8(b)

Burbank-Joseph: The suggestion is to change the caption to reflect the first words of paragraph (1): "~~Defenses and Denials~~ Responding to a Pleading." Again, this seems pure style — and an improvement.

Rule 8(d)

Burbank-Joseph: Rule 8(d)(3): Cross-references to Rule 11 are sufficiently sensitive to be noted with individual rules as well as with the global issues.

Rule 9(a)

Burbank-Joseph: Rule 9(a)(2): Present Rule 9(a) calls for a "specific negative averment." Style 9(a)(2) calls for a "specific denial." The suggestion is that "denial" refers only to a response to an allegation, and does not fit this setting because 9(a)(1) says that a pleading need not allege these things. The proposed drafting remedy is "must do so by a specific ~~denial, which must state~~ statement setting out [forth] any supporting facts that are peculiarly within the party's knowledge." This change may lose part of the meaning — a "specific denial" can be made without any supporting facts if the party making the denial does not have peculiar knowledge of any supporting facts, while "statement" might imply a duty to have and state supporting facts.

Rule 9(b)

PLAIN, 05-CV-010: "must state with particularity the circumstances" is jargon; it should be ""must state the specific circumstances."

Rule 9(h)

Burbank-Joseph: Rule 9(h)(1): The suggestion is to add a comma for clarity: "for purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules * * *."

Separately, note that we must catch up with the "2006" amendments by changing the title of the Supplemental Rules.

Rule 10(a)

Burbank-Joseph: The suggestion: "Every pleading must have * * * ~~a title that names the parties~~, a file number * * *. The title of the complaint must name all the parties; the title of other pleadings ~~may~~ must name the first party on each side * * *." The argument: The reference to title in the first sentence is redundant with the second sentence. "Must" is necessary in the second sentence because "may" implies that no party need be named.

Rule 10(c)

Burbank-Joseph: There was much discussion about deleting the reference to "exhibit." The suggestion is to restore the prior heading and restore "Exhibit": "(c) Adoption by Reference; ~~Attached Instrument~~ Exhibits. * * * A copy of a written instrument attached as an exhibit to a pleading is a part of the pleading * * *." The underlying concern is that many different kinds of papers may be filed simultaneously with a pleading, and perhaps even physically attached to it (or filed by electronic means that blur the distinction physical and metaphysical attachment). There should be a clear signal of the filer's intention, accomplished by designating as an "exhibit" anything the pleader intends to incorporate in the pleading. The most likely source of confusion may lie in "attached"; it might be better to fall back closer still to the present rule if we can manage it — something like "A copy of a written exhibit to a pleading is a part of the pleading." A pleading may incorporate a writing that is not attached. That may happen because the writing already is an exhibit — it is attached to the complaint, and the answer invokes it. Or it may happen because reliance on a writing makes it part of the pleading even though no party has attached it to any pleading. So the complaint alleges breach of a contract that is not attached. The defendant may be permitted to invoke a clause in the contract

by pleading without attaching the contract as an exhibit. Referring to an "exhibit" does not fully capture that phenomenon. This subject may deserve some further drafting attention.

Rule 11(a)

Hon. Richard E. Door, 05-CV-001: "must be signed * * * in the attorney's individual name * * *." Although "name" standing alone should be read as the real name, it is better to retain "individual" from the present rule. The suggestion is prompted by experience in an action that an attorney filed in his own name by a complaint signed in a fictitious name so "very close to his individual name that one would never think it was fictitious." There should be "no doubt about the line of responsibility for the pleading."

EDNY: "unless the omission is promptly corrected after being called to the attorney's or unrepresented party's attention."

Rule 11(b)

Burbank-Joseph: Rule 11(b)(1): References to "costs" and "expenses" have bedeviled the Style process from the beginning. Research may be needed. The question may not be whether there are clearly established and distinctive meanings for "cost of litigation" as compared to "litigation costs." It may be whether there is sufficient possibility of confusion to deter a change intended to be only a style change. The purpose was to carry forward the same meaning, and to include all expenses inflicted by the improper purpose. (The same point is addressed to Rule 26(g)(1)(B)(ii).)

Rule 11(c)

Burbank-Joseph: Rule 11(c)(2): This seems pure style. The intent is to authorize an award to the party that prevailed on the motion, no matter who wins the ultimate judgment.

Burbank-Joseph: Rule 11(c)(3), (5): Global issue — "on its own initiative."

Rule 12

Burbank-Joseph: Rule 12 Caption: Aside from these suggestions, is "When and How" too terse — should it be closer to the present "When and How Made [Presented]"? The suggestion here, taking from the 12(g), is that the caption should be in this part "~~Consolidating and Waiving Defenses~~ Consolidation and Waiver." The point is that a motion for more definite statement, a motion for judgment on the pleadings, and a motion to strike [may] fall within the 12(g) consolidation requirement, but may not involve "defenses." This seems largely style, but persuasive.

Hon. Thomas S. Zilly, 05-CV-016: To help future researchers into Rule 12 and Bankruptcy Rule 7012, the Committee Note should say that present subdivision (c) has been divided between new subdivisions (c) and (d), while present subdivision (d) has become subdivision (i).

Rule 12(a)

Prof. Bradley Scott Shannon, 05-CV-009: As in Rule 4(i), make capital the "a" — United States Attorney.

Rule 12(b)

Prof. Bradley Scott Shannon, 05-CV-009: This comment renews an issue that has been discussed at some length. Rule 12(b) says that every defense must be asserted in the responsive pleading if one is required, but allows seven defenses to be made by motion. Rule 12(h)(2) and (3) then permit two of the seven enumerated defenses — failure to state a claim or to join a Rule 19(b) party — to be

raised by a Rule 12(c) motion or at trial, and allows a lack of subject-matter jurisdiction to be raised at any time. It is urged that this internal inconsistency should be corrected.

Rule 12(f)

Burbank-Joseph: Rule 12(f)(1): Global style: on its own "initiative."

Rule 12(g)

Burbank-Joseph: Rule 12(g) caption: See Rule 12 caption above. Again, this seems a style question. Here the suggestion is that the caption should be "Consolidating Defenses and Objections." But a motion for judgment on the pleadings, for example, may be made by a plaintiff asserting that the answer establishes the plaintiff's claim; that hardly seems a "defense or objection." Perhaps "Consolidating Motions" would accurately capture both (1) and (2) — (1) says you may consolidate; (2) says that if you do not consolidate, you may not make a later motion except as provided in 12(h).

Rule 12(h)

Jack E. Horsley, Esq., 05-CV-002: There are confusing references to (b)(2) and "sub-paragraph (3)" on p. 37. Since it refers to "subject-matter jurisdiction," the most likely interpretation is that the suggestion relates to 12(h)(3). But that remains uncertain, because the suggestion is to add an inapposite reference to summary judgment: "If the court determines at any time that it lacks subject-matter jurisdiction, or summary judgment, the court must dismiss the action."

Robert MacKay, 05-CV-004: Suggests, somewhat diffidently, that Rule 12(h)(1)(B)(i) is redundant. The suggestion seems to reflect a misunderstanding. Rule 12(h)(1)(A) governs when a party has made a motion. (h)(1)(B)(i) governs when there was no motion. Both are needed.

Burbank-Joseph: Rule 12(h)(1)(B): The question of breaking the structure down as far as "(i)" items is a global style question. The cross-reference to Rule 15(a) might well be improved by making it "15(a)(1)."

Burbank-Joseph: Rule 12(h)(2): Style 12(b)(7) carries forward a motion to dismiss "for failure to join a party under Rule 19." Present Rule 12(h)(2) limits waiver by preserving a "defense of failure to join a party indispensable under Rule 19." The distinction in the present rule is deliberate. An objection based on failure to join a Rule 19(a) party is lost if not properly raised. There is no "gap," as the suggestion implies.

Burbank-Joseph: Rule 12(h)(3): The comment is correct in suggesting that present Rule 12(h)(3) is too simple. It should be read, first, to incorporate all of the doctrines that permit jurisdiction to be established even though jurisdiction could not be supported at the time of the initial complaint or removal. And it should also be read to require remand, not dismissal, when there is no subject-matter jurisdiction to support removal. It might be possible to cure these defects either in the Style Rule or in a Style-Substance Rule. But there is no reason to believe that the present rule has created any problems in this direction, and there is reason to be cautious about attempting a correction that does not unintentionally change something.

Rule 13(b)

Burbank-Joseph: The suggestion is that some difficulty might arise from saying that a pleading may state any claim as a counterclaim — Rule 13(a) says that some "must" be stated. The suggested cure

is to add a few words: "A pleading may also state as a counterclaim ~~any claim~~ against an opposing party any claim that is not a compulsory counterclaim under Rule 13(a)." This seems a style matter.

Rule 14(a)

Burbank-Joseph: Rule 14(a)(6): The present rule begins: "A third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem * * *." Style Rule 14(a)(6) begins: "If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem." The suggestion is that the Style version "implies that in rem jurisdiction is automatically available if the third party complaint is admiralty or maritime," while the present rule does not. It is difficult to see the differences of implication. In any event, the next step of the suggestion is that there is no problem "if the qualifications in the existing rule are inherent in an in rem action." The "qualifications" appear to be the references, omitted from the Style Rule, to "against any vessel, cargo, or other property subject to admiralty or maritime process in rem." Those words were omitted as surplusage: all they do is say "we really mean that a third-party complaint can assert an in rem claim against any property properly subject to an in rem claim." This suggestion is puzzling, but seems to involve a style matter.

Separately, the reference to Supplemental Rule C~~(b)~~(1) should be changed to conform to the 2006 amendment making this C(a)(1).

Rule 15(b)

Burbank-Joseph: This is style, but persuasive. The suggestion is right in observing that an argument under (b)(2) that an issue has been tried by consent can be made at trial — for example in a request for instructions or in response to a motion for judgment as a matter of law. The headings for (1) and (2) can be improved. For (1), "Evidence Objected to at Trial" might be abbreviated to "Objections at Trial." For (2), "Issues Tried by Consent" seems fine.

Rule 15(c)

Alan B. Morrison, Esq., 05-CV-003:(c)(1)(B): "a claim or defense that arose out of the ~~conduct,~~ transaction~~,~~ or occurrence set out * * *." "conduct" does not appear in similar phrases in other rules, and has no independent meaning. [These phrases may have been varied deliberately to send a subtle message that the different rules contemplate different things. As early as 14(c)(1) "transaction or occurrence" is supplemented by "or series of transactions or occurrences." In 15(d) it is "transaction, occurrence, or event." In 20(a) it again is "transaction, occurrence, or series of transactions or occurrences." In 24(a) it is a claim related to the "property or transaction." Cf. 13(g), where property also appears. The Style Project deliberately chose not to adopt a uniform phrase for all of these different settings.]

Burbank-Joseph: Rule 15(c)(1) Caption: This is Style, but seems right. Style Rule 15(c)(1) begins: "An amendment * * * relates back." It does not say "may" relate back. It should be "When an Amendment ~~May~~ Relates Back."

Burbank-Joseph: Rule 15(c)(1)(C): Two suggestions. The first is the global issue whether to subdivide down to items. The second goes to one aspect of the unfortunate reliance on Rule 4(m) that has beset the agenda item on Rule 15 that has again been assigned to a subcommittee for study.

EDNY: " * * * if, during the ~~stated~~ period provided by Rule 4(m), process was delivered * * *."

Rule 16(b)

Alan B. Morrison, Esq., 05-CV-003: Both the present rule and the Style Rule are ambiguous. The deadline for a scheduling order is "within 120 days after any defendant has been served *and* within 90 days after any defendant has appeared." Does "within * * * and within" mean "by the later of" or "by the earlier of"? Choose one. [Unless there is a clearly established reading, this is the sort of ambiguity that seems to lie outside the limits of Style.]

PLAIN, 05-CV-010: "but ~~in any event~~ within 120 days * * *." "in any event" is jargon.

Burbank-Joseph: Rule 16(b)(3)(B): Global style issue about "items."

Rule 16(c)

Burbank-Joseph: Rule 16(c)(1): This is one of many "intensifier" debates. The suggestion is: "~~If appropriate, t~~The court may require * * *." The argument for retaining an intensifier here is that there is a lot of sensitivity about requiring a party or its representative to be present or reasonably available by telephone to consider possible settlement.

Rule 16(d)

EDNY: Rule 16(d): " * * * the court ~~should~~ shall issue an order * * *." "[T]he proposed change seems to create the inference that there is discretion when, under the current Rule, there is not."

Burbank-Joseph: Rules 16(d) and (e): The suggestion is that the Style Rule simply inverts the order of present (d) and (e), and that searches will be easier if the present order is retained. But the Style Rule is a mix-and-match approach: Style (d) begins with the first sentence of present (e), directing entry of an order after any Rule 16 conference. This style choice was made deliberately.

Burbank-Joseph: Rule 16(e): This seems to be a style suggestion. The Style Rule assumed that the final sentence refers to a Style Rule 16(d) order reciting the action taken at the conference, not to an order issued after a pretrial conference but independent of it. If a style change seems indicated, it might be accomplished with fewer words: "The court may modify an order issued under Rule 16(d) after a final pretrial conference only * * *."

Rule 16(f)

Burbank-Joseph: Rule 16(f)(1): Global style — "on its own initiative."

Rule 17

Burbank-Joseph: Rule 17 Title: A style matter. The present rule's "Parties Plaintiff and Defendant" is not obviously more open to other parties than Style's "The Plaintiff and Defendant," although it more obviously refers to plural plaintiffs or defendants. The convention that we draft in the singular might be satisfied by "~~The~~ Plaintiff and Defendant."

Rule 17(a)

Burbank-Joseph: Rule 17(a), (c): The breaking up into separate parts is a style matter. There is a valid style concern that Style 17(c) seems to establish an exclusive list of representatives who may sue or defend on behalf of a minor, as compared to "such as" in the present rule. Recognizing "a like fiduciary" in Style (c)(1)(D) may be protection enough.

Rule 18(a)

Burbank-Joseph: This is style, but persuasive. Style Rule 8(a) begins by saying "a pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — * * *." Style 18(a) should preserve the distinction: "asserting an original claim * * *." Or it might not be too radical to shorten both 8(a) and 18(a): "A pleading that states a claim for relief must contain"; "A party asserting a claim may join * * *."

Rule 19(a)

Alan B. Morrison, Esq., 05-CV-003: The captions for both present Rule 19(a) and Style Rule 19(a) refer to persons to be joined if feasible. That term does not appear in the Rule 19(a) rule text. It is disconcerting to find the term in the Rule 19(b) rule text, referring to "a person who is required to be joined if feasible." The disconnect can be cured in either of two ways: (1) In Rule 19(a) — " * * * must be joined as a party if feasible and if: * * *."; or (2) In Rule 19(b): "If a person who is required to be joined ~~if feasible~~ under Rule 19(a) cannot be joined * * *."

Rule 19(b)

Alan B. Morrison, Esq., 05-CV-003: The references to an "adequate" judgment in (b)(3) and to an "adequate" remedy in (b)(4) "do not tell the court from whose perspective — plaintiff or defendant or both — the court should inquire."

Burbank-Joseph: Rule 19(b)(2): Pure style. This touches on the global issue of subdividing provisions, even though 19(b)(2) does not descend to the level of "items." The concern that subparts imply rigidity (exclusiveness) rather than flexibility is somewhat elusive, particularly since subparagraph (C) is "other measures."

Rule 20(a)

Alan B. Morrison, Esq., 05-CV-003: Both (a)(1)(B) and (a)(2)(B) carry forward the language of present Rule 20(a) allowing joinder of plaintiffs or defendants if a common question "*will* arise in the action." The difficulty is that no one can know at the outset whether a common question will arise. "may" seems too open-ended; is likely to seems better.

Separately (a)(3) carries forward the present rule in saying that the court "may" grant judgment for one or more plaintiffs or against one or more defendants. Why not "must"?

Rule 21

Burbank-Joseph: (1) A subtle argument: the present rule allowing addition or deletion of parties "at any stage of the action" means only before judgment; "at any time" in Style 21 may authorize action after judgment. Researching no further than 7 FP&P Civil 3d, § 1688.1, it appears that a motion to drop or add a party may be made on appeal, and even after an action has reached the Supreme Court. Perhaps the Style version is appropriate. (2) The global issue: "on its own initiative."

Rule 22(a)

Jack E. Horsley, Esq., 05-CV-002: Add to 22(a)(2): A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim, or a motion to dismiss because of failure to allege facts sufficient to constitute a prima facie case."

Rule 22(b)

*Alan B. Morrison, Esq., 05-CV-003: "This rule supplements * * * Rule 20. The remedy ~~it~~ this rule provides is in addition to * * *." "it" might be misread to refer to Rule 20 as the closest antecedent.

Rule 23(a)

Burbank-Joseph: Rule 23(a)(3): A subtle style point. Present (a)(3) requires that "the claims or defenses of the representative parties are typical of the *claims or defenses of the class*." Style (a)(3) changes this to "typical of the class claims or defenses." The suggestion is that the present rule uses "class" to refer to all questions that inhere in the claims of each class member, while the Style Rule uses "class" to modify only the parts of the claims or defenses that are common to all class members — that is what makes them "class" claims. We deliberately chose to be very conservative in restyling Rule 23 after some initial hesitation whether to style it at all. This point deserves careful consideration.

Rule 23(b)

Burbank-Joseph: Rule 23(b)(1): This suggestion is similar to the (a)(3) suggestion, but less developed. The concern is that "juxtaposing 'individual' and 'class'" works a subtle change in meaning. In this context, referring to prosecution of individual actions by or against individuals comprised within the class definition, it is difficult to share the concern.

Burbank-Joseph: Rule 23(b)(1)(B): Two purely style points. (1) The suggestion prefers the present language as clearer, more idiomatic, and accurate: that "would as a practical matter be dispositive," is better than the Style "that, as a practical matter, would be dispositive." (2) "or" should be added after (1)(B). (Our style convention is to use "or," or "and," only after the next-to-last item in a series. "or" is used after (1)(A) because it is next-to-last in the (1)(A), (B) series.)

Burbank-Joseph: Rule 23(b)(3): Launches a whole series of style suggestions similar to the (a)(3) and (b)(1) suggestions. Here, the change would be "questions of law or fact common to the ~~class~~ members of the class." Again, the theory is that using "class" as an adjective to modify "members" emphasizes the constituent role of those included in the class as part of the class entity, while referring to "members of the class," and so on, emphasizes the individuality of the same people. "The risk of changing the meaning of an important rule outweighs the stylistic benefit * * *."

Burbank-Joseph: Rule 23(b)(3)(A): "the ~~class members'~~ interests of members of the class." See (b)(3) above.

Rule 23(b)(3)(B): "by or against ~~class~~ members of the class." See above.

Rule 23(c)

Burbank-Joseph: Rule 23(c)(2)(B): Global issue: subdivision to the (i), etc. item level.

Burbank-Joseph: Rule 23(c)(3)(B): "whom the court finds to be ~~class~~ members of the class." See (b)(3) above.

Burbank-Joseph: Rule 23(c)(3)(B): This style suggestion is subtle. It appears to suggest an improvement on the drafting of present (c)(3) that better expresses present meaning; clearly it does not suggest reverting to the present drafting. As revised, the Style Rule would require that the judgment in a (b)(3) class action "include and specify or describe those to whom the Rule 23(c)(2) notice was directed~~;~~ and who have not requested exclusion, and whom the court finds to be class members." The concern is that notice and failure to request exclusion should be tightly bound in a way that separation by commas in an apparent series of independent elements does not accomplish. The only way to be bound is to be one to whom notice was directed and to fail to request exclusion.

Burbank-Joseph: Rule 23(c)(4): Suggested restoration: "an action may be brought or maintained as a class action with respect to particular issues." The concern is that "brought" establishes the proposition that the initial request for certification need not assert a "whole" class, but may be limited to an issues class.

Rule 23(d)

Burbank-Joseph: Rule 23(d)(1)(B): Global issue: subdivision to items goes too far.

Rule 23(h)

Susan Kleimann, 05-CV-012: "The movant must serve ~~N~~notice of the motion ~~must be served~~ on all parties * * *."

Rule 23.1(b)

Susan Kleimann, 05-CV-012: The rule says that the complaint must be verified — who must verify it? Make it active. ["A" plaintiff must verify? "The" plaintiff?]

Rule 25(a)

Burbank-Joseph: Rule 25(a)(1): Present Rule 25(a)(1) says that the action "shall" be dismissed if there is no timely motion for substitution. The Style Rule says "may." The concern is that this should be treated as Style-Substance unless "there is unanimous agreement in the case law that the existing language confers discretion." This issue was considered at length, with the advice of consultants. We should resurrect the records. It is not clear at the moment whether the Style version satisfies a test of "unanimous agreement in the case law." One question is whether that is the appropriate standard. A second question is whether there is any realistic supersession concern that would justify treating this as Style-Substance, and whether treating it as Style-Substance would actually augment the risk of unintended supersession.

EDNY: Rule 25(a)(1): Makes the same point. The present rule does not give discretion — the action must be dismissed. "The Committee is not necessarily advocating that the Rule should be a mandatory one, but merely wishes to draw attention to the fact that a substantive change is being made."

Rule 26(a)

Burbank-Joseph: Rule 26(a)(1)(A)(iv): Suggested addition: "to satisfy all or part of a possible judgment in the action." The concern is that absent this limit, the rule might require disclosure of irrelevant insurance agreements. Pure style. [It is not clear whether the failure to object on the global issue of subdividing at the item level was deliberate. Since the same global issue is not raised as to (a)(2) or (3), it may be recognized that items help navigate this particularly long subdivision. But the eventual failure to comment on items wherever they appear suggests that the point was taken to have been made in general terms. They made it clear at the November 18 hearing: the objection to item subdivision extends to all rules.]

EDNY: 26(a)(2)(B): "~~this~~ the expert disclosure required by 26(a)(2)(A) * * *."

Burbank-Joseph: Rule 26(a)(2)(B)(vi): Another neat suggestion: add these words: "(vi) a statement of the compensation to be paid for the study and the witness's ~~compensation for study~~ testimony in the case." (I think that is how they would do it.) The concern is that "the witness's compensation for study" does not include compensation paid to others who do work to support the witness's study. "The current disclosure requirement captures everything done by the expert as well as the back-up firm because disclosure is not limited to the expert's individual compensation."

Burbank-Joseph: Rule 26(a)(5): This one is fascinating. What now is (a)(5) was all of (a) until 1993, when the creation of disclosure in (a)(1) through (4) demoted it to a tag-end subdivision. It also was revised to expressly include Rule 45, albeit only one specific part; the Committee Note seems to suggest the only purpose was to "take note" of Rule 45 inspection "without the need for a deposition." It is fascinating — and sobering — to learn that some lawyers have been willing to argue that Rule 36 requests to admit and Rule 45 subpoenas are not "discovery" procedures. The idea that such arguments might be used "to elude discovery cutoff dates" is, well, surprising. But there the reported cases are; it seems likely that there are many more unreported examples. If deleting the seemingly redundant index will encourage lawyers to make such arguments, or will cause courts greater difficulty in rejecting them, we might rethink this style choice. One method of styling would be simply to list the rule numbers for the devices now described mostly by words — Rules 30, 31, 33, 34, 35, 36, and [part of] 45.

Rule 26(b)

Burbank-Joseph: Rule 26(b)(1): This comment notes that several rules refer to discovery of "documents and tangible things." One involves Style Rules 26(b)(5) and 45(d)(2), which refer to "documents, communications, or things not produced or disclosed." The inconsistency in terminology does not appear to be inadvertent. Rule 26(b)(5) is the privilege log rule; Rule 45(d)(2) is its analog for discovery from a nonparty, almost certainly copied from 26(b)(5) to be consistent. A response to an interrogatory, for example, could easily log as privileged a "communication" that is not a document. (Some thought should be given to the question whether this is true for nonparty discovery under Rule 45: could a subpoena duces tecum seek production of a "communication" that is not reduced to "document" form? Literally Rule 26(b)(5) applies at deposition. Style Rule 45(d)(2) applies to a person "withholding subpoenaed information"; does that read on a deposition response? Note that present Rule 45(d)(2) applies to "information subject to a subpoena [that] is withheld"; that might seem to aim at a deposition better than does the Style language.)

A second inconsistency is Style Rule 45(c)(2)(B). This rule establishes the procedure for objections by "[a] person commanded to produce designated materials or to permit inspection." The present rule applies to "a person commanded to produce and permit inspection and copying." The changes were the subject of explicit style discussion. The Style Rule's "designated materials" has no analog in the present rule. Do we need it? If we need it, would it be better to make it parallel to 45(c)(2)(A), which addresses "[a] person commanded to produce designated documents or tangible things"?

Prof. Bradley Scott Shannon, 05-CV-009: Rule 26(b)(1): A few unnecessary words can be omitted: "Unless otherwise limited by court order, ~~the scope of discovery is as follows:~~ * * *."

EDNY: Rule 26(b)(4)(B): " * * * But a party may do so only: * * *." Present Rule 26(b)(4)(B) allows discovery of a trial-preparation expert "only" in the two listed circumstances; the Style Rule should be consistent.

Susan Kleimann, 05-CV-012: "[W]hat exactly does 'manifest injustice' mean"? This is legal jargon.

Rule 26(e)

Burbank-Joseph: This comment tests one of the limits adopted in the Style process. Present Rule 26(e) limits the duty to supplement disclosures and discovery responses by defining it as a duty "to include information thereafter acquired." This limit was deliberately deleted in Style 26(e) on the theory, explained in the Committee Note, that in practice lawyers recognize a duty to add to prior responses whenever they learn information that makes the initial response incomplete or incorrect; it makes no difference whether the information was available at the time of the initial response or was thereafter acquired. This approach reflects the determination that a Style Rule can properly reflect what the present rule means in practice, no matter what it seems to say. The comment suggests that in practice there is a distinction between supplementing a prior response and correcting a prior response. The "safe harbor" opportunity to correct a Rule 11 violation is pointed to as an illustration of correction. It seems all the same thing — what counts is that the correction or supplementation is made, not what it is called. But perhaps there are differences. Correction is relevant to Rule 26(g) sanctions, or may be. Correction may not come within the present Rule 37(c)(1) sanctions for failure to supplement "under Rule 26(e)(1) or (2)." These possibilities may suggest that it strains Style Project limits too far to delete "information thereafter acquired" from the rule text.

Rule 26(g)

Burbank-Joseph: Rule 26(g)(1)(B)(ii): (Apparently the protest about subdividing down to the item level is now going without saying.) This raises the same question about the change from "the cost of litigation" to "litigation costs" as was directed to Rule 11(b) in the same terms.

Burbank-Joseph: Rule 26(g)(2): This one is intriguing. Present Rule 26(g)(2) says that if a discovery request, response, or objection is not signed, "a party shall not be obligated *to take any action with*

respect to it until it is signed." Style Rule 26(g)(2) reduces this to "the other party has no duty to respond." The suggestion is to restore the present language: "has no duty to ~~respond~~ take any action with respect to it." The explanation, however, raises issues that may not be addressed by simply restoring the present language. The suggestion is that an unsigned request, response, or objection is "inoperative." What action, after all, is taken in response to a discovery response? Or in response to an objection — there is no duty to move to compel discovery anyway? Do we mean to say that an unsigned response does not count for purposes of meeting the deadline for response or a discovery cutoff? The present rule does not say that. The conservative course would be to restore the present language and let the questions sort themselves out without attempting to reassure ourselves that the economy of words cannot affect the outcome.

Rule 30(b)

Alan B. Morrison, Esq., 05-CV-003: Present Rule 30(b)(5) provides that the notice to a party deponent may be accompanied by a Rule 34 request for the production of documents and tangible things at the taking of the deposition, concluding: "The procedure of Rule 34 shall apply to the request." Style Rule 30(b)(2) says that the notice to a party deponent may be accompanied by "a request complying with Rule 34 to produce documents and tangible things at the deposition." The comment observes that some subparts of Rule 34 are inconsistent with parts of Rule 30, particularly the time to respond. "It may be easier to specify the parts of Rule 34 that do apply — such as the description requirement under (b)(1)(A) — and not get involved with the rest of Rule 34." [To the extent there is a problem, it is not much aggravated by the Style Rule, although the specificity of the present rule is a help — Rule 34 procedures apply, including the time to "respond." The response may be production, or it may be an objection, or it may be a statement inspection and related activities "will be permitted." It is plain that these control — a response cannot be forced within 20 days by noticing the deposition for 20 days hence, and so on. "complying with Rule 34" in the Style Rule should be read the same way; whether the compression effected by Style is worth the potential misreading deserves attention.]

Jack E. Horsley, Esq., 05-CV-002: Style Rule 30(b)(5)(A)(v) requires the officer conducting a deposition to begin with a statement that includes the identity of all persons present. "[I]t would be advisable to add * * * a statement communicating why the identity of persons present should be part of the officer's observation."

Burbank-Joseph: Rule 30(b)(3)(A), 30(b)(5)(B): Present Rule 30(b)(2) refers to recording by "sound, sound-and-visual" means. This appears in Style Rule 30(b)(3)(A)(3) as "audio, audiovisual." Present Rule 30(b)(4) inveighs against distorting the demeanor or appearance of witnesses or attorneys "through camera or sound-recording techniques." Style Rule 30(b)(5)(B) carries forward "camera or sound-recording techniques"; it should be conformed to 30(b)(3)(A). That sounds right. There are at least two choices. Style (b)(5)(B) could refer to "camera or ~~sound-~~ audio recording techniques," or it could be simply: "camera or ~~sound-~~ recording techniques."

Rule 30(f)

Burbank-Joseph: Rule 30(f)(1), 31(b): Present Rule 30(f) requires that the officer taking a deposition "promptly send it to the attorney who arranged for the transcript or recording." Style Rule 30(f)(1) carries these words forward without change. Present Rule 31(b), addressed to a deposition on written questions, directs the officer to "file or mail the deposition." Style Rule 31(b)(3) instead directs the officer to "send it to the party." (In the structure of the rule, this means "the party who noticed the deposition.") Deletion of filing from Style 31(b)(3) reflects the amendment of Rule 5(d) that directs filing of discovery materials only when "used in the proceeding or the court orders filing." It is suggested that these provisions should be made identical; a preference is expressed for mailing to the "party" to take account of pro se cases. This suggestion presents two questions. The first is the scope of the Style Project. Rule 31 needed to be revised to account for Rule 5(d), and in a way that surmounts the possible ambiguity of the present rule by reading it to direct mailing to the party who noticed the deposition. Should the desire to make these directions uniform bring a clear change in

Rule 30(f) within the reach of Style? That question in turn leads to the question whether the change should simply substitute "party" for "attorney." It might make sense to direct that a copy of the oral deposition be sent to the party who arranged for the transcript or recording, not to the party who noticed the deposition. (Who is in charge when different parties designate different modes of recording?) And to provide differently in Rule 31. In the end the suggestion is to refer these issues to the Style-Substance track. There is no likely supersession question here. Calling it style-substance now makes no difference unless the question is put off for a further round of public comment — and then the question would be whether to delay the entire Style Project, or to let it go forward with the most satisfactory current approximation and address the larger change separately.

Burbank-Joseph: Rule 30(f)(4), 31(c): Present Rule 30(f)(3) directs the party taking the deposition to give prompt notice of its filing. Present Rule 31(c) says "when the deposition is filed the party taking it shall promptly give notice thereof." These rules reflect former Rule 5(d), which directed that discovery materials be filed unless the court ordered otherwise. Rule 5(d) was amended in 2000 to direct that discovery materials not be filed until used in the proceeding or the court orders filing. One question may be whether the Style Project can be the occasion for correcting the failure to make conforming amendments of Rules 30 and 31 in 2000. The present suggestion, aimed toward the Style-Substance track, is that the "notice of filing" should be deleted. Other rule provisions "cover the notice requirements" when transcripts are filed in connection with motion practice or similar events. That fairly puts the question: is there any value in requiring separate notice of filing? Suppose a party makes a motion for summary judgment, with appropriate notice, and then remembers to file the supporting discovery materials, or makes additional filings in response to the arguments against summary judgment: is there a clear independent notice requirement? And if a modified notice requirement seems desirable — or the conservative thing to do in the Style Project — can it properly be done as a matter of Style?

Rule 33(a)

Burbank-Joseph: Rule 33(a)(2): The suggestion fairly joins the issue. Is it really proper to decree that it is only a matter of style to correct the lamentable drafting that gave us present Rule 33(c): "An interrogatory otherwise proper is not ~~necessarily~~ objectionable merely because an answer * * * involves an opinion or contention that relates to fact or the application of law to fact"? The suggestion is that an opinion interrogatory may indeed be objectionable, as when it is addressed to a nonexpert and asks for an expert opinion. There will be arguments that the objection is "merely because" an opinion is sought, and that the subject is relevant, so the party must answer. There was a strong view earlier that correction is clearly called for, but that it is better not to test the limits of the Style Project in this way. This suggestion invites further consideration of that view.

Rule 34(a)

Burbank-Joseph: The comment renews the suggestion to adopt consistent usages of "document" and "tangible thing." It is noted again here as a reminder that the addition of "electronically stored information" to several rules in the amendments still on track to take effect on December 1, 2006, requires careful attention to all of the related rules to make sure that there are no unintentional oversights.

Rule 36(a)

Burbank-Joseph: Rule 36(a)(5), (6): Pure Style: paragraphs (5) and (6) should be combined. Both deal with objections. Fewer paragraphs are better than more.

Rule 37(a)

Prof. Bradley Scott Shannon: Present Rule 37(a)(2)(B) refers only to a failure to respond to a request for inspection under Rule 34 and an order compelling inspection. Style Rule 37(a)(3)(B) should not be expanded to include in the introduction an order compelling "production."

Rule 37(b)

Burbank-Joseph: Rule 37(b)(2)(A)(i): This suggestion is similar to one made with Rule 11(c)(2) and again with Rule 50(e), but the context of each rule invites different reflections. Present Rule 37(b)(2)(A) authorizes as a sanction for disobeying a discovery order that facts be taken to be established "in accordance with the claim of the party obtaining the order." Style Rule 37(b)(2)(A)(i) renders this as established "as the prevailing party claims." In this setting it seems nearly impossible that anyone would contend that the "prevailing party" means the party that ultimately wins judgment. It can mean only the party that prevailed by obtaining the discovery order and then by winning the sanction for violating the discovery order. But the Style question remains: is it somehow safer to fall back on the present language — "as the ~~prevailing~~ party obtaining the order claims"?

Rule 37(c)

Burbank-Joseph: Rule 37(c)(1): This is a suggestion to improve an ambiguity that exists equally in the present rule and in the Style Rule. It seems to be well within the limits of the Style Project. Present Rule 37(c)(1) begins by addressing failure "to *disclose* information as required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2)," and as a sanction says that the party is not "permitted to use as evidence * * * information not so *disclosed*." Style Rule 37(c)(1) is similar. The problem is that "disclose" in its first appearance seems to be aimed at Rule 26(a) disclosures, while "disclosed" in the second appearance clearly embraces both failure to supplement discovery responses and also failure to correct an incomplete disclosure by way of discovery or other writing. This is not good drafting. One way to revise the Style Rule might be:

> **(1)** ***Failure to Disclose or Amend.*** If a party fails to disclose the information or a witness required by Rule 26(a) — or to provide the additional or corrective information required by Rule 26(e) — the party is not allowed to use the information or witness to supply ~~as~~ evidence on a motion, at a hearing, or at a trial ~~any witness or information not so disclosed~~ * * *.

(This may not be an improvement. We might seek a substitute for "disclosed" in the second appearance. "Revealed,""supplied," or something like that.)

Rule 38(e)

Burbank-Joseph: Rule 38(e): This is pure style, but I like it. So much for "under." The point is that Style Rule 9(h) says that a claim cognizable only in the admiralty or maritime jurisdiction is governed by Rules 14(c), 38(e), 82, and the Supplemental Rules "whether or not so designated." A claim that could be brought either under the savings clause or in admiralty is governed by those rules only if designated as an admiralty or maritime claim. Style Rule 38(e), by referring to "a claim designated as an admiralty or maritime claim under Rule 9(h)," may seem to leave out an inexorably admiralty or maritime claim that does not depend on designation. To be sure, little is likely to turn on this — Style Rule 38(e) will not be read to create a right to jury trial on a pure admiralty or maritime claim; Style Rule 38(a) pretty much takes care of that. The suggestion is to restore the present language: "issues in ~~a claim designated as~~ an admiralty or maritime claim ~~under~~ within the meaning of Rule 9(h)." Or we could preserve our fond affection for "under": "issues in a claim ~~designated as~~ that is an admiralty or maritime claim under Rule 9(h)."

Rule 39(a)

Burbank-Joseph: Rule 39(a)(1): This is a variation on the global issue of "written stipulation." Here present Rule 39(a) provides for waiver of jury trial after demand " by an oral stipulation made in open court and entered in the record." Style Rule 39(a)(1) reduces this to "so stipulate on the record." The suggestion notes some uncertainty as to the meaning of "open court," and also observes that a party can waive a prior jury demand through conduct (apparently suggesting that a stipulation on the record may be conduct that effects a waiver even though it is not in "open court"). But as a style matter it suggests restoring "so stipulate on the record in open court" to avoid any risk.

Rule 40

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 40 includes a third method for placing an action on the trial calendar — "such other manner as the courts deem expedient." This is omitted from Style Rule 40. The omission may create confusion as to self-calendaring systems that enable a party to select an available date without prior notice to other parties. The Style-Substance Track version of Rule 40 seems to erase any doubt — it does not impose any implicit limits on the means a court may provide for scheduling trials. There is no need for change if the Committees believe it useful to permit self-calendaring systems. [Presumably a self-calendaring system does provide notice of the date selected, and likely a means for challenging the date.]

Rule 41(c)

Burbank-Joseph: Rule 41(c)(2): Present Rule 41(c) provides that the claimant on a counterclaim, crossclaim, or third-party claim can take an involuntary dismissal under 41(a)(1) "before a responsive pleading is served, or if there is none, before the introduction of evidence at *the* trial or hearing." Style Rule 41(c)(1)(2) changes "the" to "a": "before evidence is introduced at *a* hearing or trial." The suggestion is that "a hearing" could refer to a pretrial hearing at which evidence is introduced. Surely that is right. So the question is whether, as suggested, "the" hearing in the present rule looks only to a trial on an equitable claim. This question ties to a problem that was considered to be beyond the reach of a Style Project. As observed in 9 FP&P: Civil 2d, § 2374, the right to dismiss an action without court order terminates on the filing of an answer or of a motion for summary judgment. It appears to be absent-mindedness, not deliberate choice, that a motion for summary judgment does not cut off the right to dismiss a counterclaim, crossclaim, or third-party claim. (The Treatise cites a 1940 district-court decision that submission of an affidavit by the plaintiff on a motion for summary judgment is not the introduction of evidence at a trial or hearing.) "[T]he trial or hearing" is itself ambiguous. Suppose the claim is tried ahead of the counterclaim: does introduction of evidence at that trial cut off the right to dismiss the counterclaim without court order? "a" could easily change the answer. This is a matter of style, but in all the suggestion to revert to "the" deserves serious consideration.

Rule 42(a)

PLAIN, 05-CV-010: "join * * * any ~~or all~~ matters * * *."

EDNY: "and" between paragraphs (2) and (3) should become "or." "[C]ourts have traditionally viewed these options in the disjunctive, even though they were set forth in the original Rule in the conjunctive."

Prof. Bradley Scott Shannon, 05-CV-009: The same suggestion as EDNY above.

Rule 43(a)

Burbank-Joseph: This style suggestion is another round in the debate about "intensifiers." The 1996 Rule 43(a) amendment was deliberately drafted with intensifiers to signal the exceptional character of testimony by contemporaneous transmission from a different location. "for good cause shown in compelling circumstances" was not a mere reflex of ingrained habit. Style Rule 43(a) deleted "for good cause shown." As a global convention, "shown" is not likely to be restored. That leaves the style question: will users of the rule understand that the rules do not use intensifiers, and that "compelling circumstances" means the same as "for good cause [shown] in compelling circumstances"?

Rule 43(b), etc.

Hon. Thomas S. Zilly, 05-CV-016: Reflecting the prior abrogation of subdivisions (b) and (c), present subdivisions (d), (e), and (f) are redesignated as (b), (c), and (d). This change could create confusion for future researchers into Rule 43 and Bankruptcy Rule 9014. As with Rule 12, the Committee Note should point to the change.

Rule 44.1

EDNY: " * * * give notice by a pleading or other reasonable written notice ~~writing~~ * * *." "We believe that the elimination of the word 'reasonable' from the proposed Rule might lead some to argue that any written notice — even if unreasonable — would satisfy the Rule."

Rule 45(a)

Burbank-Joseph: This question troubled us during the style process. Present Rule 45(a)(3) authorizes an attorney to issue a subpoena "on behalf of" a court. Style Rule 45(a)(3) refers to it as a subpoena "from" a court. The comment suggests that "from" implies that the "attorney must obtain the subpoena from" the court. "The entire point of this provision is just the opposite." The comment seems to fear that "from" means the attorney must persuade the court to issue the subpoena. But the rule says that the "attorney * * * may issue and sign a subpoena from." There is no room to doubt that the attorney issues the subpoena. Unless the comment means something else, change may not be indicated.

Rule 45(b)

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 45(b)(1) requires service on each party of "prior notice" of a subpoena commanding production of documents or things. Style Rule 45(b)(1) directs that before the subpoena is served "a notice must be served on each party." This is ambiguous — how long "before"? 30 seconds? A sufficient time to afford other parties an opportunity to act before the subpoena is served? The consensus of the Bankruptcy Rules Advisory Committee was that service on the parties should be "with" or "contemporaneously with" service on the subpoenaed person. In addition, the Committee Note indicates that the Style Rule resolves some level of uncertainty and disagreement in the cases; it may be more than merely "stylistic."

Burbank-Joseph: Rule 45(b)(1): This one also is puzzling. Present Rule 45(b)(1) says that notice of a subpoena commanding production of documents or things must be served on each party "in the manner prescribed by Rule 5(b)." Those words are omitted from Style Rule 45(b)(1). The comment suggests concern that "Because a subpoena is process, the reference to Rule 5 eliminates any confusion that service need be effected on a party pursuant to Rule 4." But there should be no confusion. Rule 4 governs service of the summons. Rule 4.1 governs service of "[p]rocess — other than a summons under Rule 4 or a subpoena under Rule 45 * * *." Rule 5(a)(1)(E) says that a "written notice" must be served on every party. Rule 5(b) establishes the manner of service under Rule 5. Absent more explanation, this one does not seem to indicate a need for change.

Rule 45(c)

Burbank-Joseph: Rule 45 (c)(2)(B)(ii): A fine style point. Present Rule 45(c)(2)(B) says that if a person commanded to produce objects, the party serving the subpoena "shall not be entitled to inspect and copy * * * except pursuant to an order of the court." Style Rule 45(c)(2)(B)(i) says that the serving party may move for an order compelling production, etc.; 45(c)(2)(B)(ii) says: "Inspection and copying may be done only as directed in the order." The concern is that under the present rule it is clear that a party not "entitled" to inspect and copy can inspect and copy if the dispute is resolved without court order, while the Style version may imply that the parties cannot resolve the objection by agreement. It would be a rare court that insisted that a discovery dispute could not be resolved without its order. At any rate, the suggested revision would read: "(ii) ~~Inspection and copying may be done only~~ The serving party shall not be entitled to inspect or copy except as directed in the order * * *." [Our style would be "is not entitled."] There are other possible drafting approaches, to be explored if the subject is taken up.

Rule 48

Burbank-Joseph: The point seems to be a matter of style. Present Rule 48 begins: "The court shall seat a jury of not fewer than six * * *." It goes on to allow the parties to stipulate to a verdict "taken

from a jury reduced in size to fewer than six members." This seems clear: the jury must be at least six at the outset, and can be reduced by stipulation only when the jury is "reduced" by some event after it is seated. Style Rule 48 begins "A jury must have no fewer than 6 * * *." It concludes that "unless the parties stipulate otherwise" the verdict must "be returned by a jury of at least 6 members." That might imply that the parties can stipulate at the outset to a jury of fewer than 6 members. Of course the intent of the Style rule is the same as the present rule: there must be at least 6 at the beginning, and also at the end unless the parties stipulate to fewer than 6.

Prof. Bradley Scott Shannon, 05-CV-009: Finds a different ambiguity. The opening statement that a jury must have no fewer than 6 members seems to contradict the second sentence statement that the parties can stipulate to a verdict returned by a jury reduced to fewer than 6 members. "At the start of trial" could be added go the first sentence to correct this problem.

PLAIN, 05-CV-010: "Unless the parties stipulate otherwise, the verdict must be unanimous ~~and must be returned by a jury of at least 6 members~~." The concept of "at least 6" need not be repeated. [This comment seems to read the rule as if a stipulation can authorize a less-than-unanimous verdict, but cannot authorize a verdict by a jury reduced to fewer than 6 members. Is this a plausible misreading?]

Rule 49(a)

Burbank-Joseph: Rule 49(a)(2): Style suggestions. "The court must ~~instruct the jury~~ give the instructions and explanations that are necessary to enable ~~it~~ the jury to make ~~its~~ findings on each submitted issue." (1) "[E]xplanation" is restored from the present rule because it may mean more than instructions — for example, responding to jury questions. This suggestion parallels concerns expressed earlier. The present rule seems to reflect a concern that submission of a special verdict may be improved by explaining to the jury the nature of their task in ways that do not involve instructions on the substantive law. The suggestion deserves renewed consideration. (2) "[T]o enable it to make its findings" in the Style Rule is criticized because "it" might refer to the court rather than the jury. This criticism ignores the style convention of the last antecedent, and in any event suggests an implausible reading of the Style Rule.

Burbank-Joseph: Rule 49(a)(3): Present Rule 49(a): "[E]ach party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." This can be read to say that if the plaintiff objects but the defendant does not and the plaintiff wins the verdict on other issues, or the court decides the issue to the plaintiff's satisfaction, the defendant has waived the right to jury trial. (Surely this result would follow if the defendant argued that the issue should not be submitted to the jury.) Style Rule 49(a)(3) begins by stating that "A party waives the right to a jury trial on any issue of fact * * * unless, before the jury retires, *the* party demands its submission to the jury. If *the* party does not demand submission, the court may make a finding * * *." This more clearly expresses the meaning attributed to the present rule above. But the suggestion is that the present rule means something else: If the plaintiff objects to omission of the issue, the court may not make a finding and the defendant is entitled to jury trial of the issue. If that is right, revision is in order; the suggestion is "If ~~the party does not~~ no party demands submission, * * *." (Compare Rule 51(d)(1)(A): during the recent revision of Rule 51, it was suggested that any party should be allowed to raise on appeal an objection to the instructions that was made by any other party, so long as it is the same objection. That suggestion was rejected in favor of the view expressed in the rule — only the party that made the objection can assert error on appeal.)

Rule 49(b)

Burbank-Joseph: Rule 49(b)(1): This suggestion is similar to the first suggestion for Rule 49(a)(2) above. Present Rule 49(b) requires the court to give the jury "such explanation or instructions" as may be necessary. Style Rule 49(b)(1) omits any reference to explanation. Communicating to the jury the thought that they must both return a general verdict and also answer the written questions may well be better described as "explanation" than as "instruction." The specific suggestion is: "The court must ~~instruct the jury to enable it to render a general verdict and~~ direct the jury to answer the

questions in writing and to render a general verdict, and must ~~direct~~ give the instructions and explanations that are necessary for it to do ~~so~~ both." [A streamlined version might be: "The court must give an explanation and instructions that enable the jury to render a general verdict and answer the questions in writing."]

Rule 50(a)

Jack E. Horsley, Esq., 05-CV-002: Suggests adding — just where is not clear — "and make a prima facie case."

Rule 50(e)

Prof. Bradley Scott Shannon, 05-CV-009: **(1)** Present Rule 50(d) says only that "nothing in this rule precludes [the appellate court] from determining that the appellee is entitled to a new trial." That is not the same as the Style Rule's statement that the appellate court may order a new trial. This part should be rewritten to reflect the present rule or should be deleted. **(2)** Present Rule 50(d) does not say that an appellate court can order judgment as a matter of law after the trial court denies the motion. It is a mistake "to codify some perceived ability, based only on pragmatism, on the part of appellate courts to decide issues not first decided by trial courts."

Rule 51(c)

Burbank-Joseph: Rule 51(c)(1): This suggestion seems right on. "A party who objects to an ~~proposed~~ instruction * * * must do so on the record * * *." Present (c)(1) is "an instruction." The suggestion correctly observes that an objection is timely under (c)(2)(B) if the party first learns of the instruction when it is given. And the objection should be made on the record.

Rule 52

Burbank-Joseph: A persuasive style suggestion for the Rule title. Rule 52(a)(1) includes actions tried with an advisory jury. So: "Findings and Conclusions by the Court ~~in a Nonjury Proceeding~~; * * *."

Rule 54(a)

Burbank-Joseph: A sensible style suggestion, with a possible variation, that also points to an internal absurdity of Rule 54(a). (1) The suggestion is that "shall" in the present rule should become "may" in the Style Rule, not "must." The dilemmas that arise from "shall" are familiar. Here the point that a judgment "should still be given effect" despite a violation of Rule 54(a) seems persuasive. Perhaps the best outcome would be: "A judgment ~~must~~ should not include recitals * * *." (But note that Rule 58(a) requires that a judgment must be set out in a "separate document" that cannot include anything else. "Must" might after all be appropriate but for the next problem.) (2) Rule 54(a) defines a judgment as any order from which an appeal lies. That includes all sorts of things other than final judgments. The most likely sort of self-contradiction arises from collateral-order doctrine. As one familiar example, an order denying an official-immunity motion to dismiss or for summary judgment might well explore — "recite" — the pleadings. It would be foolish to say that because Rule 54(a) transforms the order into a judgment the court cannot explain its decision in this way. More generally, the margins of collateral-order appeal are uncertain; the district judge may have no reason to suppose that an order that recites pleadings or the like is a "judgment" because it is appealable.

Rule 54(b)

Burbank-Joseph: Style: "the court may ~~enter~~ direct the entry of a final judgment." The suggestion points out that under Rule 58(b)(1) the clerk enters judgment, and under 58(b)(2) the court approves judgment "which the clerk must promptly enter." So in Rule 59(a)(2) it is provided that on motion for a new trial in a nonjury case the court may "direct the entry of a new judgment."

Rule 54(d)

Alan B. Morrison, Esq., 05-CV-003: Present Rule 54(d)(2)(C) provides for a hearing on a request for attorney fees "on request * * * of a class member." Style Rule 54(d)(2)(C) begins "Subject to Rule 23(h) * * *." The Committee Note is clear, but the rule text is not. It would be better to delete this from (d)(2)(C) and add it to the exceptions in (e): "Subparagraphs (A)-(D) do not apply to claims for fees and expenses * * * subject to [governed by? under?] Rule 23(h)." (Style Rule 54(d)(2)(C) was deliberately drafted after extensive discussion; it is intended that most of the (d)(2) procedure apply to fee motions in class actions.)

Burbank-Joseph: Rule 54(d)(1): Several style suggestions.

(1) Present Rule 54(d)(1) is: "Except when *express provision* therefor is made" by statute or rule. Restore "expressly provide otherwise." Courts recite "express provision," and this is not surplusage.

(2) Present Rule 54(d)(1) is "unless the court otherwise directs." This should be restored. The Style Rule is "Unless * * * a court order provides otherwise." That might be interpreted to allow a court to provide otherwise by standing order.

The suggestion that combines (1) and (2) is:

Unless a federal statute or these rules ~~or a court order~~ expressly provide~~s~~ otherwise or the court directs otherwise, costs * * *.

(3) A familiar problem of translating "shall." Present Rule 54(d)(1) begins with exceptions, then says "fees shall be allowed as of course to the prevailing party." It is wrong to Style this as "should be allowed." As a matter of logic, providing exceptions and then saying "shall" implies "must" unless the exceptions apply. And "as of course" "was meant to create a mandatory presumption in favor of allowing costs in the absence of the court's specific explanation to the contrary, according to 10 Moore § 54.101[1][a]." A contrasting sense seems to be expressed in 10 FP&P: Civil 3d, § 2668: Allowing costs to the prevailing party "is not a rigid practice * * * inasmuch as the rule itself empowers the court to direct otherwise. Other then when the matter is controlled by a federal statute or rule, Rule 54(d) vests the court with a sound discretion, which extends to all civil actions and embodies a practice long recognized in equity. * * * In keeping with the discretionary character of the rule, the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case." Apart from the seeming differences of treatise views, one of the considerations in translating "shall" has been to avoid "must" when the "must" is qualified by significant discretion.

Burbank-Joseph: Rule 54(d)(2)(D): A style suggestion that seems right. The tagline should be expanded: " * * * Reference to a Master or a Magistrate Judge." The rule expressly includes a magistrate judge.

Rule 55(b)

Burbank-Joseph: Rule 55(b)(2): Again two suggestions.

(1) "the party must apply to the court for a default judgment." So says the present rule. Although the caption is "By the Court," the caption is "not supposed to carry weight." The balance of the rule does not supply any indication that it is the court, not the clerk, that directs entry of judgment in the circumstances covered by (b)(2).

(2) "The court may conduct evidentiary hearings or make referrals * * *." The present rule requires service of notice "at least 3 days prior to *the* hearing on" the application for default judgment. The implication that there must be a hearing is lost in the Style Rule. (In considering this style point, there may be a need for further research. 10A FP&P: Civil 3d, § 2688, begins: "Rule 55 does not require that testimony be presented as a prerequisite to the entry of a default judgment, and thus several courts have determined that a hearing is not required before entering a default." If there is a hearing, it "is not considered a trial, but is in the nature of an inquiry before the judge.")

Rule 56(a)

Burbank-Joseph: This suggestion ties to the Time Counting Project: "A party claiming relief may move * * * after * * * (1) 20 days have passed from commencement of the action." The present rule is "after the expiration of 20 days from the commencement of the action." This creates a "dead zone of twenty days." As distinguished from most time periods, the 20th day — although the last day of the designated period — is not the last day for doing something but the last day before something can be done. The style question is whether there is any doubt about the meaning of the Style Rule.

Rule 56(c)

EDNY: In Style Rules 56(c), (d), and (e)(2), "should" should be replaced by "'shall,' as in the current Rule, because otherwise it would appear that a substantive change would result." (This particular problem of translating "shall" was resolved in favor of "should" because of the well-established proposition that a district court has discretion to deny summary judgment even though the required showing has been made. The Committee Note addresses the change.)

Rule 56(d)

Burbank-Joseph: Rule 56(d)(1): The suggestion: "If on motion summary judgment is not rendered on the whole action * * *." The concern: without "on motion," which is in the present rule, the Style Rule may seem to impose a duty on the court to act sua sponte to enter "partial summary adjudication."

Prof. Bradley Scott Shannon, 05-CV-009: Rule 56(d)(2): Rule 56(d)(1) makes (d)(2) "redundant and therefore unnecessary." [Style Rule 56(d)(2) is taken from the final sentence of Present Rule 56(c). It may serve some purpose, in part to reassure that a court may not only establish "facts" but also may establish liability, and in part to solidify the rule that a Rule 56 order establishing liability is not ordinarily an appealable judgment. That it may also carry forward some tension with collateral-order appeal doctrine seems inevitable — an order granting summary judgment on liability for a plaintiff, rejecting an official-immunity defense, is appealable as if a "final" decision.]

Rule 56(e)

Alan B. Morrison, Esq., 05-CV-003: " * * * an opposing party ~~may~~ must not rely ~~merely~~ on allegations or denials in its own pleading * * *." "Merely" adds nothing. "may" is inadequate because failure to submit counter evidence forfeits the right to claim the facts are in dispute. ["merely," adapted from the present rule, does serve a role. Without it, the rule would say that a party may not rely on its own allegations or denials — but the allegations or denials are essential to identify the materiality of facts. As to the choice between "may" and "must," the dilemma is familiar. "may" seems to work. And it may be better in this setting — this sentence comes into play only if the moving party has "supported" a motion for summary judgment in the sense that its showing has carried the summary judgment burden and it wins summary judgment unless the nonmoving party fights back.]

Rule 57

Burbank-Joseph: A style suggestion: "A party may demand a jury trial under the circumstances and in the manner provided in Rules 38 and 39." This is another challenge to our beloved "under." The concern is that simply saying "under" may imply that Rule 57 creates a right to jury trial that can be perfected by making a timely demand under Rule 38. The Style response is that Rule 38 only sets out the procedure for asserting a jury trial right that arises from another source. But the Style conventions may not deter lawyers from making the argument, and even might fail the court confronted with the argument.

Rule 58(a)

Burbank-Joseph: Rule 58(a)(2): The comment on Rule 62(b), described below, might best be resolved by this change: "to amend or make additional findings ~~of fact~~ under Rule 52(b)."

Rule 59

Hon. Thomas S. Zilly, 05-CV-016: The caption might better reflect the rule if it read: "New Trial; Altering or Amending a Judgment"

Rule 59(a)

Burbank-Joseph: (1) Both (1)(A) and (B): "for any reason for which a new trial ~~has~~ could have been properly granted in * * *." It is asserted that present Rule 59(a) "clearly conveys the sense of limiting the grounds to proper reasons for granting a new trial." The source for that assertion in the present rule text is not clear. Clearly it says "have heretofore been granted," without "properly." (This language should not be read to mean that if one court grants a new trial for an improper reason all later courts may grant new trials for the same reason — that it is made "proper" by the first court's erroneous grant "heretofore.") Changing to "could have been" seems to open it up — never mind whether it ever has been done, so long as it could have been done. More importantly, this language was vigorously contested during the Style process. The maddeningly obscure language of the present rule was carried forward from a sense of at least two things — it has not actually required that specific precedent be found, and it has not impeded flexible development of new-trial standards.

(2) A style "and" "or" choice. Present Rule 59 separates (1) and (2) by "and." The suggestion is that "or" fits better — it was either a jury trial or a nonjury trial. Of course it might be both — a single trial may be tried in part to a jury, in part to the court. In that setting "and" actually fits better, or may seem to. But "or" is likely to cause less confusion to casual readers, and fits better with the common preference for "or" in Style Rule lists of alternatives.

Rule 59(c)

Burbank-Joseph: Another global issue on "written" stipulation.

Rule 60(a)

Burbank-Joseph: Change the tag line: "Corrections ~~Based on~~ of Clerical Mistakes~~;~~ and of Oversights and Omissions."

Rule 60(b)

Alan B. Morrison, Esq., 05-CV-003: Present and Style Rule both refer to granting relief from a judgment to a party or its "legal representative." This term appears nowhere else in the rules; it adds nothing; and it may cause confusion in comparison to the reference only to a party in the Rule 60(d)(1) recognition of an independent action for relief from a judgment.

Burbank-Joseph: Add to the tag line: "Grounds for Relief From a Final Judgment, ~~or~~ Order, or Proceeding." Whatever a "final proceeding" might be, they added "final" in 1948 deliberately to describe all three — judgments, orders and proceedings. (The question whether to retain "proceeding" in the rule text was fought in the Style process; it was deliberately retained, so why not add it to the tag line?)

Rule 60(d)

Burbank-Joseph: Rule 60(d)(2) A good style suggestion: "grant relief * * * to a defendant who ~~is~~ was not personally notified * * *."

Rule 61

Alan B. Morrison, Esq., 05-CV-003: Both present and Style Rules are captioned "harmless error," but that phrase does not appear in either rule text. The present rule is verbose and to some extent

internally inconsistent. The Style Rule is less clear, but still substantially redundant. Why bother to say "at every stage of the proceeding"? Begin: "The court must disregard ~~all~~ harmless errors and defects * * *." Append "unless the interest of justice otherwise requires" to that. [This part is unclear. But remember other suggestions that Rule 61 at least should conform to Evidence Rule 103. We may want to think further about this one; the current Style version inherits a lot from the present rule, and reflects a conservative approach to change.]

Burbank-Joseph: The suggestion is that "the Committee not restyle Rule 61 but rewrite it to incorporate the standards of Fed.R.Evid. 103 and place it on the style/substance track." Evidence Rule 103(a) begins: "Error may not be predicated upon a ruling.* * * unless a substantial right of the party is affected * * *." The first sentence of present Rule 61 concludes by saying that no error is ground for relief unless refusal to act on the error "appears to the court inconsistent with *substantial* justice." Style Rule 61 inverts the order of the sentence, and begins "Unless justice requires otherwise." No "substantial." But the second sentence concludes by stating that the court must disregard all errors and defects "that do not affect any party's substantial rights." So the Style question is twofold, beginning with the common grounds that Rule 61 should be consistent with Evidence Rule 103 and that the same words should be used to express the same thought in different sets of rules. First, "substantial" was no doubt dropped from "justice" as an "intensifier" — what other sort of justice do we seek? Insubstantial? Absolute? Second, "substantial" does appear in the Style Rule, and in a position that clearly applies to all errors, including errors in admitting or excluding evidence. Is that parallel enough?

Rule 62(a)

Burbank-Joseph: "But unless the court orders otherwise, the following are not ~~automatically~~ stayed * * *." The first sentence establishes a 10-day period before execution may issue. The second sentence excepts two situations from the 10-day stay. The suggestion is that "automatically" is distracting. The 10-day stay results from Rule 62(a), not from court order; there is no stay in three sets of circumstances unless the court orders a stay.

Rule 62(b)

Burbank-Joseph: Rule 62(b)(2): This Style comment finds inconsistencies of expression that trace to the present rules. Both present and Style Rule 52(a) direct the court to "find the facts specially." Present and Style Rule 52(b), addressing amended or additional findings, refer only to "findings" and "additional findings," without adding "fact." Present and Style Rule 58(a)(2), although referring to Rule 52(b), speak of "additional findings of fact." Present Rule 59 on new trial motions says the court may "amend findings of fact * * * or make new findings." That accurately reflects the terminology of 52(a) and (b) — the originals are referred to as findings of fact, and the new or amended ones are referred to as findings. Finally, both present and Style 62(b) accurately refer to a Rule 52(b) motion as one "to amend the findings or for additional findings." If consistency is to be achieved, the best approach may be to amend Rule 58(a)(2).

Rule 62(c)

Burbank-Joseph: (1) The suggestion: "After an appeal is taken from an interlocutory ~~order~~ or final judgment that grants * * * an injunction." The reason: Present Rule 62(c) is "interlocutory or final judgment." Rule 54(a) describes any order from which an appeal lies as a "judgment." And Rule 62(a)(1), governing stays, refers to "an interlocutory or final judgment in an action for an injunction." But "order" may be defended: The underlying statute, § 1292(a), governs appeals from "interlocutory orders." Rule 54(a) makes it a judgment only if an appeal lies; Rule 62(c) seems to apply even if the order is not in fact appealable (fine lines are drawn, for example, in determining whether an order "denies" and injunction). And "order" could not be added to Rule 62(a)(1) because there are many interlocutory orders in injunction actions that are not involved with execution or stays. Finally, Rule 54(a)'s "definition" is a wreck that remains uncorrected because of the difficulty of repair. So a nice style choice.

(2) The suggestion: " * * * the court may suspend, modify, restore, or grant an injunction while the appeal is pending on terms * * *." The present rule is "during the pendency of an appeal." Compare Style Rule 60(a): "after an appeal has been docketed and while it is pending," a district court can correct a clerical mistake only with appellate leave. This same question is caught up in drafting an "indicative ruling" procedure, where similar language has been suggested.

(3) The suggestion: "on terms for bond or other terms that appropriately secure the opposing party's rights." The argument: Present Rule 62(c) is "terms * * * it considers proper for the security of the rights of the adverse party." Style Rule 62(b) begins "on appropriate terms for * * * security." If an intensifier is proper in 62(b), why not also 62(c)?

Rule 62(d)

Alan B. Morrison, Esq., 05-CV-003: [This comment seems to overlook Appellate Rule 5(d)(2). Both present and Style Rule 62(d) allow an appellant to file a supersedeas bond "after filing the notice of appeal or after obtaining the order allowing the appeal." The comment appears to assume that a notice of appeal is required when an appeal is not available as a matter of right but instead requires permission of the court of appeals, as under § 1292(b) or Rule 23(f). But a notice of appeal is required by Appellate Rule 3 only for an appeal as a matter of right; Appellate Rule 5(d)(2) states that a notice of appeal need not be filed after a court of appeals grants a petition for permission to appeal.]

Burbank-Joseph: The suggestion: "the appellant may, by supersedeas bond, obtain a stay, ~~except in an action described~~ subject to the exceptions contained in Rule 62(a)(1) or (2)." The argument: A stay may be obtained by court order in the 62(a)(1) or (2) cases. Rule 62(d) means only to say that a stay may not be obtained in those cases by posting a supersedeas bond. "except in an action" may carry the wrong implication that no stay at all is available. The same result might be obtained, retaining the Style preference for "except," by rearranging: "the appellant may obtain a stay by supersedeas bond, except in an action described * * *."

Rule 62(f)

Burbank-Joseph: A recurrent style question: "under ~~state~~ the law of the state where the court sits." The court does not sit in state law, it sits in a state.

Rule 62(g)

Burbank-Joseph: This suggestion draws from reading the present rule to recognize appellate court authority "to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered" outside the period when an appeal is pending. It is pointed out that the All Writs Act authorizes a court of appeals to act without an appeal — before an appeal can be taken, or after the mandate issues. In related fashion, it is suggested that it "sounds a bit silly" to begin the rule "While an appeal is pending" — there is an implication that the rule *does* limit appeal power outside the time when an appeal is pending. Combining the style suggestions, the revised rule might look like this:

> **(g) Appellate Court's Power Not Limited.** ~~While an appeal is pending, t~~This rule does not limit the power of the appellate court or one of its judges or justices ~~to~~:
>
> **(1)** while an appeal is pending, to stay proceedings, or to suspend, modify, restore, or grant an injunction; ~~(2)~~ or
>
> (~~3~~2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

Rule 63

Jack E. Horsley, Esq., 05-CV-002: " * * * any other judge may proceed with it upon certifying familiarity with the record and any pending motions * * *." (This version is an approximation of the apparent suggestion.)

Burbank-Joseph: An apparently correct suggestion: "If the judge who ~~commenced~~ conducted a hearing or trial is unable to proceed * * *." The present rule is "If a trial or hearing has been commenced and the judge is unable to proceed * * *." This language includes the situation in which one judge commences the proceeding, a successor is named, and the successor becomes unable to proceed. The Style language does not, at least not without strain.

Rule 64(a)

Burbank-Joseph: The suggestion renews an issue that provoked extensive discussion earlier: "every remedy ~~is available~~ that~~, under the law of the state where the court is located~~ provides for seizing a person or property to satisfy the potential judgment is available under the circumstances and in the manner provided by the law of the state where the court is located." The Style version was drafted on the assumption that "is available that, under the law of the state * * * provides for" means "is available under the circumstances and in the manner provided by the law of the state." Pure style.

Hon. Thomas S. Zilly, 05-CV-016: " * * * provides for seizing a person or property to secure satisfaction of ~~satisfy~~ the potential judgment." This would make it clear that seizure of the person does not satisfy the judgment, but is designed to secure satisfaction.

Rule 64(b)

Burbank-Joseph: This revisits the global issue about subdividing to the point of items in a different guise: "bullets" are described as "irksome practical problems." How is a bullet rule quoted — are ellipses required? Must the bullet point appear? (Note that present Rule 23(c)(2)(B) uses six bullets; the Style Rule converts them to romanet items (i) through (vii).)

Rule 65(a)

Burbank-Joseph: Many references are provided to explore the question whether a preliminary injunction can issue only after a "hearing," or whether notice and an opportunity for hearing suffice. The change from "Before * * * *the* hearing" in the present rule to "Before * * * *a* hearing" in the Style Rule is suggested to dilute the implication of "the" that a hearing is required. Rather than change back to "the," it is suggested that the proposed change be placed on the Style-Substance track.

Rule 65(b)

Burbank-Joseph: Rule 65(b)(1): The suggestion: "without written or oral notice." The argument: present Rule 65(b) is "without written or oral notice." The 1966 Committee Note says that "informal notice * * * is to be preferred to no notice at all." In the other direction, the Style Rule's simple reference to "notice" might be read to refer to notice that is served. The present rule, moreover, refers to injury that will result "before the adverse party or that party's attorney can be heard." That further weakens the encouragement to give notice to the attorney.

Rule 65(c)

Burbank-Joseph: The central concern is that present Rule 65(c) is commonly read to allow a court to waive security despite saying that "[n]o * * * injunction shall issue except upon the giving of security * * * in such sum as the court deems proper." Style Rule 65(c) says "the court must require the movant to give security in an amount that the court considers proper." The style fear is that "must require" is stronger than "no injunction shall issue except." The published Style draft reflects the belief that discretion in setting the amount of security includes discretion to set it at zero, carrying forward present practice. Whether or not that is right, the concern is carried further in the suggestion that the rule should be redrafted to make explicit the extent of the court's discretion. That may be more than Style-Substance, better a project for independent consideration and publication as a substantive change. A supersession concern is also suggested: if the Style Rule restricts discretion more than the present rule, it might supersede statutes that imply greater discretion. This concern needs to be developed further, apart from the general supersession concerns addressed to the entire enterprise. By the look of the descriptions, the statutes that have been involved in the cases do not

speak directly to injunction bonds. Instead, they evince policies that favor enforcement in the public interest. Supersession in relation to general policies is a rather slippery concept. But there well may be statutes that provide for preliminary injunctions without bond. If so, the present rule may have unintended supersession consequences (depending on the date of the statute), and a Style Rule should recognize that statutes control (surely there is no intent to supersede such statutes, whether old or contemporary).

Rule 65(d)

Burbank-Joseph: Rule 65(d)(2): The Style Rule correctly translates the present rule if the present rule was properly punctuated. The suggestion raises an important question whether the present rule was indeed properly punctuated. The present rule uses a series separated by commas to describe the persons bound by an injunction. The final item in the series is "those persons in active concert or participation with them who receive actual notice of the order." Absent a comma, this limits the notice requirement to persons in active concert or participation. But the suggestion points to substantial evidence that an injunction does not bind a party until the party has notice, and does not bind a party's officer, etc., until that person has notice. That is an attractive proposition. If further research bears it out, the notice requirement can be worked into (d)(2), something like: "The order binds only the following persons who receive actual notice of the order by personal service or otherwise:"

Burbank-Joseph: Rule 65(d)(2)(C): This one certainly is a research project. Present Rule 65(d) says that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with *them* * * *." This language is thought to be ambiguous: does "them" refer to parties and their officers etc., or only to "parties"? Style Rule 65(d)(2)(C) is unambiguous — the injunction binds anyone acting in concert with a party's officers, etc. Alternative cures are suggested: eliminate "or (B)" from C, expressly limiting the binding effect to a person who acts in concert with a party; or move to the style/substance track. The first alternative changes meaning if, as the suggestion notes, there is substantial authority that an injunction binds a person acting in concert with a party's officers, etc. The suggestion then speculates that if the Style rule expands the court's authority to bind a nonparty, "it might run afoul of the substantive rights limitation of the Rules Enabling Act." Perhaps a rule that contracts the court's authority runs the same risk — it abridges or modifies the underlying substantive rights.

Rule 65(e)

Hon. Thomas S. Zilly, 05-CV-016: Is it necessary to carry forward the descriptions of 28 U.S.C. §§ 2361 and 2284 in (e)(2) and (3)? Those statutes "contain nothing beyond the matters included in the Rule's description."

Rule 66

Alan B. Morrison, Esq., 05-CV-003: The second sentence begins "But:" There is no reason of principle to avoid that, but "but" serves no use here.

Burbank-Joseph: In the end, the first suggestion seems to be one of style. It points out that Rule 66 applies only to a receiver appointed by a federal court. The capacity of a state-court receiver to sue or be sued is governed by Rule 17(b). If the Style Rule creates confusion on this score, it should be revised. The first sentence says that these rules govern an action in which a receiver sues or is sued. That is fully consistent with Rule 17(b) applying to a state-court receiver, and no less clear than the final sentence of present Rule 66. The second sentence manifestly applies only to a federal-court receiver. And the third sentence applies only to an action in which a receiver has been appointed — a state-court receiver is not appointed in the action.

The second suggestion relies on decisions that put a fine gloss on the second sentence of present Rule 66: "The *practice in the administration* of estates by receivers * * * appointed by the court shall be in accordance with the *practice* heretofore followed in the courts of the United States

or as provided in rules promulgated by the district courts." It is asserted that "practice" refers to the procedures by which a receiver obtains authority to act as an owner would, while "administration" refers to the receiver's dealings with the property. This distinction leads to the fear that the second sentence of Style Rule 66 blurs this distinction by saying only that a receiver "must *administer* an estate according to the historical *practice* in federal court * * *." The authorities relied upon to support the suggestion clearly confirm the proposition that federal rules govern the decision whether to appoint a receiver, even in a diversity action. 12 FP&P § 2983; 13 Moore's § 66.09. But they do little to support the attribution of a distinction between appointment as "practice" and administration as something else. 12 FP&P § 2982 at p. 18 suggests that appointment "is part of the 'practice in the administration of estates.'" Phelan v. Middle States Oil Corp., 2d Cir.1954, 210 F.2d 360, rules that an accounting in a federal equity receivership is governed by the federal rules, not "local rules." In all, the Style Rule may adequately capture the meaning of the present rule.

Rule 67

Burbank-Joseph: Pure style. The suggestion: "must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 ~~and~~ or any like statute." The argument: "and" suggests you must comply with all statutes. "or" allows compliance with one or the other. The counterargument: you must comply with any statute that applies — if more than one applies, you must comply with all, while if only one applies there is no problem.

Rule 68

Burbank-Joseph: (1) Points out a real need to revise Style Rule 68(a). The present rule requires an offer to be made "more than 10 days before the trial begins." The Style Rule is "at least 10 days before the trial." Not only is this one day less, but it also has a reverse effect: a period "more than 10 days" escapes the rule that excludes intervening Saturdays, Sundays, and legal holidays in calculating a period less than 11 days. (1.1) In addition, the present rule "before the trial begins" may be different from the Style Rule "before the trial." The suggestion cites a case ruling that for purposes of Rule 68 a trial begins when the court actually commences to hear the case, not with jury selection.

(2) This one is more style, but troubling. Present Rule 68 describes an offer of judgment "for the money or property or to the effect specified in the offer." Style Rule 68(a) shortens this to "judgment on specified terms." The concern is that the present rule is more ambiguous with respect to a defendant's freedom to specify conditions — for example, what are the consequences if the offer is conditioned on acceptance by all plaintiffs, some plaintiffs accept but others do not: can costs be shifted to a plaintiff that did accept? (2.1) The change to "specified terms" makes it more difficult to argue that a Rule 68 offer cannot be made for judgment for equitable relief. The suggestion notes that there is support for using Rule 68, but notes that it seems to be agreed that the court cannot be required to enter an equitable decree simply because a Rule 68 offer is accepted. (2.2) Similarly, it is noted that although recent authority rejects use of Rule 68 in a class action, the matter is not free from doubt, but at the same time an accepted offer can be made a judgment only if the court approves it as a settlement under Rule 23(e). The upshot of these several concerns is the suggestion to add language at the end of Style Rule 68(a): "Except in cases where court approval of the judgment is required, ~~T~~the clerk must then enter judgment."

(3) A supersession concern specific to Rule 68 is expressed. There are conflicting decisions, but the current trend is to rule that a defendant cannot moot a class action by making a precertification offer of judgment for the full relief available to the individual class-representative plaintiffs. This conclusion may rely in part on finding that a specific statute contemplates class remedies. The fear is that a Style Rule 68 will supersede the implications of such statutes.

(4) Another specific supersession concern is addressed to Style Rule 68(d). It carries forward verbatim the language of present Rule 68: the offeree must pay the costs incurred after" [the making of the offer][the offer was made]." Nonetheless, the general supersession concern is offered: adoption of the Style Rule will supersede statutes enacted in the interval between adoption of the original and adoption of the new. A case is cited for a statute that invokes Rule 68 but also includes an exception

— to that extent the statute supersedes Rule 68, and the supersession tables might be turned by adopting a Style Rule 68.

Rule 68(c)

Hon. Thomas S. Zilly, 05-CV-016: "~~It~~ The offer of judgment must be served * * *." The first sentence refers to things other than the offer of judgment; the change improves clarity.

Rule 69(a)

Hon. Thomas S. Zilly, 05-CV-016: Present Rule 69(a) calls for enforcement by writ of execution "unless the court *directs* otherwise." Style Rule 69(a)(1) changes "directs" to "orders." "In the bankruptcy rules, we use 'directs' as a broader term that covers standing orders and local rules, so that stylistic choice may be significant if applied to our rules." Although the Civil Rules Committee generally prefers "orders," the change here may leave open some question about the application of local rules or other directives by courts when the rule refers only to orders as compared to the language in the existing version of Rule 69(a)(1)."

Burbank-Joseph: Rule 69(a)(1): The suggestion: "must follow the procedure of the state where the court is located, but the court need not follow state procedure that would prevent enforcement of the judgment, and a federal statute governs to the extent it applies." The argument: present Rule 69(a) says procedure on execution "shall be in accordance with" state practice and procedure. But this is interpreted to require only substantial compliance — technical state requirements should not prevent enforcement of a federal judgment. Style Rule 69(a)(1) threatens to diminish flexibility, increasing the risk that unwise state procedure will thwart enforcement of a federal judgment, by saying that the procedure on execution "must follow" state procedure. This seems a question of style — does "must follow" imply greater fealty to the details of state practice than "be in accordance with"?

Rule 71

Burbank-Joseph: The suggestion: "When an order ~~grants relief for~~ is made in favor of a nonparty * * *." The argument: The present rule says "is made in favor of." "It is not obvious * * * that orders in favor of purchasers, witnesses, or masters constitute 'relief,' at least as that term is used in Rule 8."

Rule 71.1(b)

Gregory R. Mowe, 05-CV-: "No matter who owns them" may seem to imply disregard of the substantive rules that a state cannot condemn federally owned property, some owners such as cemeteries are generally exempt, and so on. It would be safer to say "whether or not in common ownership."

Rule 71.1(c)

Burbank-Joseph: Rule 71.1(c)(4): The suggestion: "order any distribution of ~~the~~ a deposit * * *." The argument: There may not be a deposit. See Style Rule 71.1(j).

Rule 71.1(e)(3)

Gregory R. Mowe, 05-CV-: When more than one person has an interest in the condemned property, the hearings progress in two stages. First is a hearing on the total to be paid for the taking. Next is a hearing on allocation among the defendants with interests in the same property. This distinction would be better reflected by restoring three words: "evidence on the amount of compensation to be paid for the property and may share * * *."

Rule 71.1(h)(2)(A)

Gregory R. Mowe, 05-CV-: The court has power to appoint a commission whether or not a jury has been demanded. Subparagraph (A) should begin: "Whether or not a party has demanded a jury, the court may appoint a three-person commission * * *."

Rule 71.1(i)

EDNY: The subheading for subdivision (i) should be revised to correspond to the present rule: "(1) ~~By the Plaintiff~~ As of Right." The change will "make it clear that the plaintiff has this right and that it is not subject to the discretion of the court."

Rule 71.1(j)(2)

Gregory R. Mowe, 05-CV-: It would help to preserve the standard phrase by restoring "just" in the first sentence: "so as to distribute the deposit and pay just compensation." And the second and third sentences should be revised "to retain identification of the party in whose favor money judgments run."

Rule 72(a)

Alan B. Morrison, Esq., 05-CV-003: The next-to-last sentence ends in "to." That can be avoided by deleting the sentence and incorporating it in the last sentence: "~~A party may not assign as error a defect in the order not timely objected to.~~ The district judge ~~in the case~~ must ~~consider timely objections and~~ modify or set aside any part of the order that is clearly erroneous or is contrary to law, provided that a timely objection to the order was made to the magistrate judge." [If we go this way, the conclusion should be revised — the objection is addressed to the district judge, not to the magistrate judge. Something like: "must modify or set aside any part of the order to which timely objection was made and that is clearly erroneous * * *." Or, if we stick by using "to" at the end, "any part of the order {that was} timely objected to and that is clearly erroneous * * *."]

Burbank-Joseph: The suggestion: "referred to a magistrate judge to hear and ~~decide~~ determine * * * and * * * issue a written order stating the ~~decision~~ disposition." The argument: Rule 72 is intended to track the statute. § 636(b)(1)(A) is "hear and determine"; (b)(1)(B) is recommendations "for the disposition, by a judge of the court." It is better to retain the statute's words. (This question was actively discussed in the Style process. This independent reaction warrants further consideration.)

Rule 72(b)

Alan B. Morrison, Esq., 05-CV-003: As with Rule 72(a), protests the conclusion of the first sentence in (b)(3) with "to."

Burbank-Joseph: Rule 72(b)(1), (b)(3): These suggestions mirror the Style Rule 72(a) suggestion, apparently suggesting that in (b)(1) "recommended disposition" be changed to "recommendation for disposition," and in (b)(3) "disposition" be changed to "recommendation for disposition." As compared to Style Rule 72(a), this is a suggestion for improving on the language of the present rule, which uses "recommended disposition" and "disposition" in the same places that those words are used in the Style Rule.

Rule 73(a)

Alan B. Morrison, Esq., 05-CV-003: Raises the perennial question whether it is useful to cross-refer to a statute that governs of its own force. Rule 73(a) concludes with a reminder of the statute that requires a record of the proceedings.

Burbank-Joseph: The suggestion: "a magistrate judge may, if the parties consent, conduct ~~the~~ any or all proceedings in a civil action * * *." The argument: "any or all" is the language of § 636(c)(1) and the present rule.

Prof. Bradley Scott Shannon, 05-CV-009: Rules 1 and 2 establish that these rules apply only to civil actions: " * * * may * * * conduct the proceedings in an ~~civil~~ action * * *."

Rule 73(b)

Alan B. Morrison, Esq., 05-CV-003: (b)(2): "may ~~again advise~~ remind the parties of the magistrate judge's availability * * *." "Again advise" carries the possibility of coercion by repeated advice.

Rule 73(c)

Alan B. Morrison, Esq., 05-CV-003: As with Rule 73(a), questions the need to cross-refer to the statute authorizing appeal to the court of appeals from a judgment entered at a magistrate judge's direction.

Rule 77(a)

Jack E. Horsley, Esq., 05-CV-002: "Every district court is considered always open on any business day for filing any paper * * *."

Rule 77(c)

Alan B. Morrison, Esq., 05-CV-003: Questions the need for (b)(2), reminding of the clerk's responsibility to enter a default under Rule 55(a). [The separation of (b)(2)(B) and (C) was deliberate; it is useful to reinforce the sharp distinction between the initial default and the subsequent default judgment.]

Burbank-Joseph: Rule 77(c)(2): The suggestion: "the clerk ~~may~~ shall as of course grant motions and applications to * * *." The argument: Present Rule 77(c) begins "All motions and applications," and concludes "are grantable of course by the clerk." That describes ministerial duties requiring that the clerk must act on a motion or application that is properly presented, and must not act on one that is not properly presented. "may" implies an improper degree of discretion. 12 FP&P, § 3083, sheds no light. (I think this question was discussed at some point in the Style process and that it was concluded that discretion should be reflected in the Style Rule. At any event, the point should be researched.)

Rule 78

Burbank-Joseph: Present Rule 78 says that each district court "shall" establish regular times and places to hear and dispose of motions, "unless local conditions make it impracticable." Although that seems closer to "must" than "should" or "may," Style Rule 78(a) translates "shall" as "may." The reduction was chosen purposefully, from a feeling that this command (or near-command) is obsolete. The suggestion is that the change should be put on the Style-Substance Track.

Rule 79(a)

Alan B. Morrison, Esq., 05-CV-003: This is essentially a suggestion that Present Rule 79(a) has it wrong. The present rule, carried forward in Style Rule 79(a)(3), directs the clerk to enter "jury" on the docket "[w]hen in an action trial by jury has been properly demanded or ordered." The objection is that the clerk should not be charged with determining whether a jury demand is proper — the rule should provide that the clerk note "jury" on the docket whenever a jury demand is made, leaving it to the parties to object and the court to decide. [This may or may not be right. The demand may be obviously untimely, or made in an action that clearly does not include jury trial. In any event, a change is warranted in the Style Project only if the present rule is uniformly read against its meaning.]

Rule 80

Burbank-Joseph: The suggestion is that Rule 80 not be restyled at all, and that the question be referred to the Evidence Rules Committee. Many reasons are advanced; it is better to read them than to summarize. Some seem to read the reference to trial and hearing in both the present rule and the Style Rule as including a deposition. And several point to several ways in which a transcript may come into

existence, apparently on the assumption that Rule 80 somehow requires a separate transcript — or, perhaps, on the assumption that unnecessary duplication will result from the requirement that the transcript be certified by the person who recorded [reported] the testimony. There also is a specific supersession argument that involves the long-delayed effort to undertake a joint reconciliation of all of the Civil Rules evidence provisions with the Evidence Rules — most of the Evidence Rules carry on in the form initially adopted by statute, making this a specific variation on the general supersession concern addressed to all of the Style Project.

National Court Reporters Assn., 05-CV-013: The Style rule works if a stenographic reporter took testimony. "However, in trials or hearings where the testimony is recorded electronically, oftentimes the individual who takes/records the testimony will not be the individual to transcribe and certify the record. The proposed changes to Rule 80 do not reflect these realities and may cause unintentional issues with compliance."

Rule 81(a)

Burbank-Joseph: Rule 81(a)(6)(B): A nice style point. Rule 81(a)(6) begins by applying the Civil Rules to "proceedings under the following *laws*." Subparagraph (B) is "9 U.S.C., relating to arbitration." The suggestion is that "9 U.S.C." is not a "law"; it is a Title in the U.S. Code. The specific recommendation is to say "all laws codified in 9 U.S.C. relating to arbitration." [Perhaps this could be "all those in 9 U.S.C. relating to arbitration."]

Rule 81(d)

Burbank-Joseph: Rule 81(d)(1): The suggestion is to abrogate the analogous part of present Rule 81(e). Present 81(e) says that when a Civil Rule refers to state law, the reference "includes the statutes of that state and the state judicial decisions construing them." Recognizing that this was drafted before Erie, Style Rule 81(d)(1) changes this to include state statutes and state judicial decisions. The concern is that "includes" does not exclude other manifestations of state law such as court rules or state constitutional provisions. The rule is unnecessary and potentially misleading. [This is a fair question. The point of Rule 81(d)(1) is to provide interpretive guidance to the Rules. It is not an attempt to restate Erie. But a Civil Rule that incorporates state law surely may incorporate a state court rule, as noted in the Committee Note, and state constitutional provisions as well. Possibly someone could be misled. And perhaps there is no need to describe the sources of state law. Abrogation may be within reach of the Style Project.]

Prof. Bradley Scott Shannon, 05-CV-009: As Burbank-Joseph, urges that Rule 81(d)(1) be deleted — expanding the definition of state law to include all the state's judicial decisions "is arguably substantive and in any event remains underinclusive (and perhaps also somewhat overinclusive)."

Rule 82

Prof. Bradley Scott Shannon, 05-CV-009: Rule 4(k)(2) clearly affects personal jurisdiction. Rule 82 should be: "These rules do not extend or limit the subject-matter jurisdiction of the district courts * * *."

Rule 86

Prof. Bradley Scott Shannon, 05-CV-009: "opinion" in (2)(B)is not the right word, although it appears in Present Rule 86(a): "~~in~~ the district court~~'s opinion,~~ determines that applying them in a particular action would be infeasible or work an injustice." [This suggestion points up another question: Present Rule 86(a) reads "in the opinion of the court." That should include the opinion of an appellate court — we do not want to establish an unreviewable district-court discretion, nor should we seek to broaden whatever discretion is now read into Rule 86(a). Why not "the ~~district~~ court determines * * *."?

Style-Substance Track

Rule 8(a)(3)

Burbank-Joseph: It seems better to restore "relief in the alternative." The suggested tie to Form 10 illustrates the point: the plaintiff seeks relief against one defendant, the other defendant, or both defendants as the facts may justify. That is relief in the alternative; it is not at all clear that it is an "alternative form[] * * * of relief." To be sure, at least Rules 8(e)(2), 18(a) [and perhaps (b)], and 20(a) clearly authorize joinder and pleading of demands for relief in the alternative. That may be all the more reason for a clear reflection in 8(a)(3).

Rule 11(a)

Burbank-Joseph: It is equally true that not everyone has a telephone number or an address. Restoring "if any" may be useful to reassure pro se litigants that they can file even though they lack one or more of these means of contact. (It seems a bit more than style-substance can bear to try to add something that requires a homeless person to designate a means of service other than Rule 5(b)(2)(C) (leaving it with the court clerk).)

EDNY: Rather than "electronic-mail address," say "e-mail address." This is current usage, and corresponds with the expression in the Committee Note.

Rule 16(c)

EDNY: Rule 16(c)(1): restore "telephone": "* * * be present or reasonably available by telephone or other means." "This would make clear that the telephone is a reasonable and acceptable means."

Rule 26(g)(1)

Burbank-Joseph: See Rule 11 above. But note that present Rule 26(g)(1) requires only an address and does not say "if any." At least at first blush, it seems desirable to say "if any" in both rules or in neither.

EDNY: Rule 26(g)(1): as with Rule 11: " * * * must state the signer's address, e-mail address, and telephone number~~, and electronic-mail address~~."

EDNY: Rule 26(g)(1)(B)(i): To make this consistent with Style Rule 11(b)(2): " * * * for extending, modifying, or reversing existing law, or for establishing new law."

Rule 30(b)(3)(A)

National Court Reporters Assn., 05-CV-013: The pure Style rule, tracking Present Rule 30(b)(2), says that the noticing party bears the recording costs, and that any party may arrange to transcribe a deposition *that was taken nonstenographically*. The Style-Substance Track version deletes "that was taken stenographically." This may change the impact of the rule for a deposition taken stenographically by obliging "the noticing party to pay attorney's fees as well as pay the cost of an original even if they don't want the transcript simply because the other party orders a copy." [This was not the intended meaning; the change was designed only to make it clear that any party should be able to arrange transcription of a deposition recorded stenographically as well as of one recorded by other means. The thought was that "recording costs" means just that — the party who notices the deposition pays the stenographic reporter for recording. Whichever party wants a transcript pays the cost of a transcript. Is there room for misreading?]

Rule 30(b)(6)

EDNY: The caption should be expanded: " * * * to an Organization or Entity." In each of the three places where "organization" appears after the first sentence, it should be supplemented by adding "or entity." "We make this suggestion because the terms 'organization' and 'entity' are not coterminous, and we agree * * * that the coverage of Rule 30(b)(6) should encompass both."

Rule 31(c)

Burbank-Joseph: We had difficulty with this one from the beginning. We cannot say "transcript" because the deposition may have been recorded by audio or visual means. But "completed" is made ambiguous by its use in Style Rule 30(e)(1), which uses it to refer to completion of the original testimony; the deponent's review and changes come after that. Perhaps, with suitable changes in the tag lines, Style 30(c)(1) could read:

> (1) ***Notice of receipt.*** The party who noticed the deposition must notify all other parties when it ~~is completed~~ receives the deposition under Rule 31(b)(3).

(This may be rough. What happens under 31(b)(3) is that the officer taking the deposition sends it; literally, receipt is not "under" 31(b)(3). But we are not allowed to say "pursuant to." We cannot tell the party to notify other parties that the deposition was sent because the party may not know of the sending and may not receive it.)

Rule 36(b)

Burbank-Joseph: This comment is puzzling. Perhaps it inadvertently relies on present Rule 16(d). Style Rule 16(d) does say that any pretrial order "controls the course of the action unless the court modifies it." That does not describe a standard for modification, but it does state controlling effect and it does authorize modification. The suggestion is not persuasive. [The suggestion was amplified at the November 18 hearing. The problem is that Style Rule 16(d) says only that a pretrial order controls unless it is modified; it does not make sense to say that a Rule 36 admission controls unless it is modified without providing any standard that permits but also limits modification. The Rule 36 standard should govern modification of any Rule 36 admission except one that is incorporated in a final pretrial order. If incorporated in a final pretrial order, the demanding Rule 16(e) standard for modification should control.]

Rule 71.1(d)(2)(B)

EDNY: As with Rules 11 and 26(g), change "electronic-mail address" to "e-mail address."

Rule 78

EDNY: Revise the Caption: "Hearing Motions; ~~Advancing an Action~~ Submission on Briefs The provision for advancing an action is being deleted. And subdivision (b) is devoted to submission on briefs.

Style Forms

General

Jack E. Horsley, Esq., 05-CV-006: Looks with favor on these materials.

United States Department of Justice, 05-CV-031: "The draft forms represent a careful and thoughtful analysis of the existing forms * * * [T]he revisions should help simplify and clarify the forms * * *." The restyled Appellate and Criminal Rules seem to work well. "The Department strongly supports the current initiative to restyle the civil forms and believes that Committee has done valuable work."

Form 3

*Linda M. Schuett, Esq., 05-CV-005: "(Use 60 days if the defendant is the United States, ~~or~~ a United States agency, or ~~is~~ an officer or employee of the United States ~~allowed 60 days by~~ sued in the capacities provided for in Rule 12(a)(3)(A) ~~or~~ and (B).)" **NOTE** we must delete "(A) or (B)." Style Rule 12(a)(3) does not have subparagraphs. [Capacity is not the best emphasis in referring to 12(a)(3) — the focus is on suit for an act or omission occurring in connection with duties performed on the United States' behalf. Going back to the Rule text is necessary under either version.]

Form 5

Burbank-Joseph: Several comments are provided with Style Rule 5.

(1) Style Rule 4(d)(1) states a duty "to avoid unnecessary expenses of serving the summons." The second paragraph of Style Form 5 twice refers to avoiding "costs." This should be "expenses" not only because that conforms to Style Rule 4, but also because "expenses" better conveys the idea.

(2) Style Rule 4(d)(4) says that when the plaintiff files a waiver of service "these rules apply as if a summons and complaint had been served at the time of filing the waiver." Style Form 5 draws from present Rule 4(d)(4) in saying that "the action will then proceed as if you had been served on the date the waiver is filed." The suggestion seems to be that Form 5 should be revised to track Rule 4. But this may be a case where the more colloquial expression works better in the form, while the more precise expression works better in the rule.

(3) The fourth paragraph says "I will arrange for formal service" and ask for an order that the defendant pay "costs." "Formal service" may be puzzling. "Expenses" should be substituted for "costs": "I will arrange to have the summons and complaint served on you and ask the court to require you, or the entity you represent, to pay the expenses of making service." (This looks like an improvement.)

(4) Drawing from present Form 1A, the fifth paragraph asks the defendant to read the enclosed statement about the duty to waive formal service. This invokes Style Form 6, which includes two parts — a waiver of service and an attached statement of the duty to avoid unnecessary "costs." The statement is described in Form 6 as the Duty to Avoid Unnecessary Costs. The reference here should invoke that description, changing "costs" to "expenses": "Please read the enclosed statement about the duty to avoid unnecessary expenses." (This seems right.)

Burbank-Joseph: See item (4) in the comments on Form 5: The statement of duty should be "to Avoid Unnecessary ~~Costs~~ Expenses of Serving * * *."

Form 6

Linda M. Schuett, Esq., 05-CV-005: Suggests a different arrangement of the paragraphs and a deletion:

> * * * A * * * defendant * * * who fails to return a signed waiver * * * will be required to pay the costs of service, unless the defendant shows good cause for the failure. [here brings up the first sentence of the next paragraph:] "Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property. [here breaks the paragraph]

If the waiver is signed and returned, you can still make ~~these and other~~ all defenses and objections * * *.

Form 10

Linda M. Schuett, Esq., 05-CV-005: Two general observations. (1) "[I]t is time to delete all or most of the complaint forms. The forms sanction a method of pleading that may not comply with existing pleading rules," and that in any event is "out of sync with existing practice." (2) Overall, the manner of dealing with interest in the forms is appropriate. It is better not to add a phrase such as "as available under existing law."

Form 11

Linda M. Schuett, Esq., 05-CV-005: Today it sounds odd to say that the defendant drove a motor vehicle "against" the plaintiff. "into" might be better.

Form 17

Linda M. Schuett, Esq., 05-CV-005:

Therefore, the plaintiff demands that:

(a) ~~that~~ the defendant ~~now~~ be required to specifically perform the agreement and pay damages of $____, plus interest and costs~~;~~ or

(b) ~~that~~ the defendant be required to pay damages of $____, plus interest and costs, if specific performance is not ordered ~~, the defendant pay damages of $____, plus costs~~.

Form 18

Linda M. Schuett, Esq., 05-CV-005: Delete a comma " * * * notice * * * on all electric motors it manufactures and sells~~;~~ and has given * * *." In addition:

Therefore, the plaintiff demands: * * *

(c) ~~an assessment of~~ interest and costs ~~against the defendant~~.

Form 19

Linda M. Schuett, Esq., 05-CV-005: In the demand for relief, bring up "that" before the colon and delete it from each of (a), (b), (c), (d), and (e): "the plaintiff demands that: (a) ~~that~~ until this case * * *," etc. Also would delete a comma in (b): " * * * all profits * * * in selling the defendant's book~~;~~ and all profits * * *."

Form 20

Linda M. Schuett, Esq., 05-CV-005: (1) Bring up "that" before the colon and delete it from (a){recommends deleting all of (c), so no need to delete "that" separately}: "plaintiff demands that: (a) ~~that~~ each defendant be restrained * * *." [If this is done, (b) will have to be rewritten to accommodate the "that" introduction; see (2).] (2) revise (b): "a judgment, plus costs, be entered declaring that no defendant is entitled to the proceeds of the policy or any part of it~~;~~ but if the court determines * * *." The comma is thought to introduce an ambiguity — "Without the comma, it is clear that a discharge of the plaintiff occurs only if the court has determined that the policy was [sic — means was not] in effect at the time of the insured's death. [The comma seems to have the intended effect, clearly separating the alternative requests for judgment.]

Form 21

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the plaintiff demands that: * * * (b) the conveyance to defendant name be declared void and ~~that~~ any judgment granted be a lien on the property.

Form 30

*Linda M. Schuett, Esq., 05-CV-005: (1) "(Set forth any counterclaim against an opposing party in the same way that a claim is pleaded * * *.)" (2) "Set forth ~~the~~ any crossclaim against a ~~defendant~~ coparty in the same way a claim is pleaded * * *.)" [Both of the revisions in (2) should be adopted.]

Form 31

Linda M. Schuett, Esq., 05-CV-005: "Therefore, the defendant demands that: * * * (d) the defendant recover ~~its~~ costs and attorney's fees."

Form 50

Linda M. Schuett, Esq., 05-CV-005: The form begins with a blank, allowing the requesting party to specify the number of days allowed to respond. So does present Form 24. But here, and in Form 51, it should be "respond within the time provided in Rule 34." [Rule 34(b)(1)(B) says that the request must specify a reasonable time for inspection and for performing the related acts. That seems to fit better with a blank to be filled in by the requesting party.]

Form 51

Linda M. Schuett, Esq., 05-CV-005: As with Form 50, suggests that the blank for the number of days to respond should be replaced by a specified period. This is different from Form 50 and Rule 34 because Rule 36 sets 30 days for a written answer or objection. But it also says that "A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court." Perhaps a blank works here as well. But Professor Marcus also has suggested that "the time periods provided in the rule should always be inserted," quoting from 8A FP&P § 2257, pp. 540-541. The treatise suggests that present Form 25 should have been revised in 1970 when Rule 36 was amended. Before 1970, Rule 36(a) required a response "within a period designated in the request, not less than 10 days after service * * *." The treatise also expresses the fear that a requesting party might ignorantly attempt to set a time shorter than the 30-days set by Rule 36, or innocently set a longer time with the result that the longer time is viewed as binding in the way that a Rule 29 stipulation is binding.

Form 70

Linda M. Schuett, Esq., 05-CV-005: Two suggestions:

(1) "[the plaintiff name recover from the defendant name the amount of $____ with pre-judgment interest at the rate of _%, ~~along with~~ post-judgment interest, and costs.] Looking only to Maryland law, explains that the rate of pre-judgment interest varies according to the nature of the case, while post-judgment interest is set by statute.

(2) "[the plaintiff recover nothing, ~~the action be dismissed on the merits~~ a judgment be entered in favor of the defendant, and the defendant name recover costs from the plaintiff name.]" [This depends on actual practice; if courts continue to enter judgment that the plaintiff take nothing, rather than a judgment that the defendant "wins," the change should not be made.]

Global Style Issues

Burbank-Joseph: "On its own [initiative]." The first appearance is in the comment on Rule 4(m). The comment suggests that the strong custom of adding "initiative" to this expression should prevail — lawyers will waste time puzzling whether there is a difference. It also is suggested that everything a court does is its "own" act, even when there is a motion; that there is a reason for the tradition. See also Rule 11(c)(3) and (5); 12(f)(1); and many others.

Burbank-Joseph: Cross-references: The first time this is raised is with Style Rule 8(d)(3), where it is suggested that we should restore "Subject to the obligations set forth in Rule 11." The importance of cross-references to Rule 11 has been discussed vigorously. It may deserve further thought.

Burbank-Joseph: Romanet "items": This suggestion first appears with Rule 12(a)(1)(A). It is that the practice of dividing and insetting should not go beyond the subparagraph level: (a)(1)(A), but no further parts that we have called "items." The comment recognizes that using "bullets" is even less attractive — "fifth bullet" is harder than "(v)," easier to miscount, and harder to search. So it recommends more comprehensive subparagraphs. This is a style choice. The Criminal Rules use items; the style choice may be well entrenched. And some of us like it.

Burbank-Joseph: "Written" Stipulation: Considerable energy was spent in deciding that it was proper to reduce "written stipulation" in several rules to "stipulation." The comment is that the present rules do not authorize oral stipulations, while the Style Rules do. "[T]his restyling is more than mere simplification or clarification * * *." The change is identified in Rules 29(b), 30(a)(2)(A), 30(b)(4), 31(a)(2)(A), 33(a)(1), 33(b)(2), 36(a)(3), and 59(c).

Prof. Bradley Scott Shannon, 05-CV-009: "may": Suggests that "may" should be "might" when it is used to express probability or likelihood -- Rules 14(a)(1), 24(a)(2), and 26(a)(1)(A), (2)(A), and (3)(A) are offered as examples. In Rule 33(a), "may" should become "can." (Of these, "might" deserves serious consideration in 24(a)(2).)

Prof. Shannon: "action"/"case": "Action" should be used consistently throughout; other terms — most notably "case" — should not be substituted when there is no difference of meaning. Style Rules 26(b)(1)(B)(iii) and 50(a)(2) and (b) are particularly troubling. But "case" is acceptable when there is a different concept, as in Style Rule 9(h)(3)'s reference to an "admiralty case." And a different word should be substituted when "action" is used as a verb or in reference to other steps — see Rules 16(d), 23.1(b)(3); 26(c); 37(a)(5)(A)(i); 37(d)(1)(B); 53(f); 54(d)(1); 77(c)(2). 16(d) and 23.1(b)(3) are particularly annoying because they use "action" in two different senses.

Prof. Shannon: "court"/"judge"/"clerk": generally it is better to refer to the court as an institution, not to individuals such as the judge or clerk. See Rules 16(b), to be compared to 16(a); 23(f).

Prof. Shannon: "Issue" as a verb: As a noun, "issue" has a well-established meaning in the Rules. It should not be used as a verb. The choice to avoid "enter" and "make" seems reasonable, but "render" would be a better choice.

Prof. Shannon: "Claim" as a verb: "Claim" also has a well-established meaning as a noun. It should be used as a verb only in the same context. Better choices might be "assert" or "argue." See Rules 26(b)(5), 37(b)(2)(A)(i); 45(d)(2).

Prof. Shannon: "Shall" to "must": "[I]t is not at all clear that 'shall,' as used throughout the Current Rules, has any meaning other than "must." In every Rule, present "shall" must be rendered as "must." E.g., Rules 1; 15; 16(d); 25; 33(a)(1); 54(d)(1); 56. The change to "should" in Rule 56 is particularly suspect in light of the 1986 Supreme Court decisions on summary judgment.

PLAIN, 05-CV-010: Passive Verbs: Still more verbs should be changed from passive to active. Examples: 26(e)(2) could begin "The party must disclose"; Rule 39(b) could be "The court tries any issues"; Rule 52(a)(6) could be "The court must not set aside findings of fact."

PLAIN: Nominalizations: Words are wasted when verbs are turned into nouns. Examples: Rule 16(e) could be "facilitate admitting evidence"; Rule 24(b)(3) could be "the court must consider whether intervening will"; Rule 49(a)(3) could be "the party demands that it be submitted to the jury."

PLAIN: "is commenced": Should be "is begun," see Rules 3, (4)(1), 17(a), 63, "elsewhere."

PLAIN: "Knowledge and information": Should be simply "information." For example, Rules 8(b)(5), [11(a)], 26(g)(1).

PLAIN: "so": In Rule 5(b)(3), "if a local rule ~~so~~ authorizes it; in Rule 8(b)(5), "must say so ~~state~~."

PLAIN: "statute": "statute" should be "law" — as in Rules 38(a), 45(b)(2)(C), 54(d)(2)(B)(ii), and elsewhere.

PLAIN: "Compensation": "compensation" should be "payment" — Rules 43(d),53(b)(2)(E), 71.1(d)(2)(A)(iv), and elsewhere.

PLAIN: Long Sentences: A few long sentences slipped through, as in Rules 13(b) and 14(c)(1).

The Civil Rules Advisory Committee met and held a public hearing on November 18, 2005, at the University of Chicago Law School. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq.. Former Committee Member Judge Schira Ann Scheindlin also attended. Dean Mary Kay Kane, member of the Standing Committee and the Style Subcommittee, was present. Professor Edward H. Cooper was present as Reporter, Professor Richard L. Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as Consultant. Professor R. Joseph Kimble, Style Consultant, attended. Elizabeth Shapiro, Esq., Department of Justice, also attended. Professor Stephen B. Burbank and Gregory P. Joseph, Esq., appeared to present the work of a team of 21 professors and practicing lawyers that worked together under their leadership to study the Style Rules and the Style Forms published for comment in 2005. John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Thomas Willging represented the Federal Judicial Center.

SUMMARY OF HEARING

Judge Rosenthal opened the hearing. She noted that the several hearings on the recent proposals to amend Rule 23 and to adapt the discovery rules to developing practice in discovering electronically stored information elicited testimony from a great many witnesses. The subject of this hearing, the Style Project, provides a marked contrast. Only true believers in the importance of finegrained rule language are interested. They understand the difficulty of the challenges posed by a project designed to make the rules clearer, simpler, more consistent, without changing their meaning.

The importance of the Style Project arises in part from the observation that too many lawyers fail to read rule text with the careful attention required to master often complex meaning. Indeed some skeptics would assert that too many lawyers fail to read the rules at all. Redrafting to achieve greater clarity, to bring meaning home more readily to those who read on the run, will help. Those who have mastered the meaning of present rule language will have no difficulty in finding the same meaning translated into better language and structure. And those who have not bothered to read the present rules carefully will benefit to the extent that they recognize the need to read the rules at least once again after they have been restyled. As Professor Gensler put it, "it's like falling in love for the second time."

The Style Project began in 1991. After a tentative beginning with the Civil Rules, it switched focus. First the Appellate Rules and then the Criminal Rules were restyled. Those projects are widely viewed as successfully. Now the Civil Rules are taking their turn.

Professor Burbank and Mr. Joseph have performed a great service to the Rules Committees and to the profession by putting together their working group. Their collected comments show close examination of the published draft "at the cellular level." Their willingness to come to this hearing for further discussion of the comments is deeply appreciated. They are the sole occasion for holding the hearing; the other two scheduled hearings have been cancelled for want of anyone interested in appearing.

Discussion will begin with general comments, turn to exploration of the rules that seem to raise the most significant questions, open up to discussion of many finer points, and conclude with remarks on the overall enterprise.

Professor Burbank opened the discussion by noting that the memorandum summarizing the working group's recommendations is in some ways an understatement. He and Gregory Joseph

edited the body of recommendations extensively. Many comments that seemed to be matters of style only were left on the cutting room floor. But the recommendations do retain style issues that seem to involve meaning and style suggestions for improving the rule headings as cues to content. Nor was an attempt made to identify every instance of changes that would be made if the "global" recommendations were adopted; for example, acceptance of the recommendation to avoid substructuring the rules down to the level of romanet "items" below the subparagraph level would require many more changes than listed. The overall approach reflected the guiding rule that a change that arguably affects meaning falls outside the boundaries set for the Style Project. And if there is a close question whether a style change also affects meaning, or generates a risk of unintended supersession effects, the change should be separated out from the Style Project for independent treatment.

Judge Rosenthal welcomed law students who had appeared for the hearing. She then noted that it will be profitable to consider the large questions first. The Advisory Committee has discussed the question of how best to avoid any risk that a restyled rule might be read to expand the effects of the present rule in superseding inconsistent statutes enacted before the effective date of the Style amendments. The intent is clear: each rule should have the same supersession effect the day it was adopted as the present rule had the day before. In restyling the Criminal Rules this issue was approached primarily through Committee Note language. What is the best way to ensure that there is no supersession effect?

Professor Burbank responded that supersession is not an easy question "because intent does not trump the statute." A later-enacted rule supersedes a statute enacted before the rule was adopted. An example is provided by the Private Securities Litigation Reform Act. The statute, adopted in 1995, includes several provisions inconsistent with present Rule 11. Readoption of Rule 11 without change makes it later in time, so that it might come to replace the inconsistent statutory provisions. One approach would be to do what the original Advisory Committee did, expressing the lack of supersession intent in Committee Notes. But that is no more than a "pious hope." Since 1938, indeed, many courts have become less and less inclined to look to Committee Notes for guidance. Another approach would be to express the Committees' intent in a rule, but that could not supersede § 2072(b) — it would be circular to attempt to rely on the supersession power to supersede supersession. Or there might be a rule provision stating that no new inconsistency should be deemed to arise between the rule provisions adopted on December 1, 200X and any statute as it existed on the same day.

In response to a question, Professor Burbank suggested that probably no thought was given to the parallel supersession issues that might have been thought to arise from the sweeping amendments of almost all the Civil Rules when they were made gender-neutral in 1987. He was separately asked why the 2003 Rule 23 amendments did not supersede the Private Securities Litigation Reform Act, and responded that there is no serious problem — the rule and statute can be read to find there is no conflict. That cannot be done with Rule 11, which is inconsistent with the PSLRA. The uncertainties about supersession are aggravated because, for whatever reason, there are few reported cases interpreting § 2072(b).

Supersession will, in any event, present archeological problems. To ensure that the restyled rule does not change supersession effects it will be necessary to consult the language of the rule as it was immediately before restyling.

Again, in response to a question, Professor Burbank noted the suggestion in the cover memorandum transmitting the working group's suggestions: one approach may be to include a "no new supersession" provision in Rule 81, preserving the supersession effects of the current rules

without change. At any event, he suggested that the supersession effects will present a "relatively rare" transaction cost in the array of transaction costs presented by the project. Supersession issues do not appear to arise frequently.

Separately, Professor Burbank observed that despite the frequent comments that the restyling of the Appellate and Criminal Rules has been successful, there has been no indication that any data actually support these observations.

Rule 65: Professor Burbank summarized the comments on Rule 65. Professor Edward Hartnett did much of the work on Rule 65. The comments do not reflect all of his research; the balance will be provided to the Committee. Several problems appear.

Present Rule 65(a)(2) begins: "Before or after the commencement of the hearing" on an application for a preliminary injunction. Style Rule 65(a)(2) changes "the" to "a." This is an important and dangerous change. To be sure, rule references to a "hearing" are imprecise. Everyone recognizes that a hearing may not be a live appearance. But the change could have a dramatic impact on the opportunity to be heard. "the" should be restored.

Present Rule 65(b) describes limits on a temporary restraining order granted "without written or oral notice to the adverse party." Style Rule 65(b)(1) shortens this to "without notice." "written or oral" should be restored to emphasize that informal notice is better than no notice.

The Rule 65(c) provisions for security present a set of problems. Although the present rule says that no restraining order or preliminary injunction shall issue except on the giving of security "in such sum as the court deems proper," it is not read to require adequate security. Courts fear that an adequate security requirement would defeat the opportunity to grant important relief to parties who cannot afford security. Some courts rely on a strained reading of the rule to conclude that it is appropriate to order less-than-adequate security, or even to require no security at all. Other courts rely on finding policies in statutes that do not explicitly say that no security is required but that embody protective principles that should not be defeated by requiring security. But it is not clear that requiring security in the amount of $0 is a good interpretation of the present rule, and the Style Rule provision that the court "must require" security "in an amount that the court considers proper to pay the costs and damages sustained" may make this reading even more difficult. The style language seems to confine discretion by directing a focus on an amount that seems reasonably calculated to compensate.

Professor Burbank further observed, in response to a question, that the Style Rule presents a supersession problem with respect to statutes that might be relied upon to show a policy that defeats injunction-bond security. The problem would arise when the statute was enacted between the time of present Rule 65(c) and the adoption of the Style Rule.

It was observed that courts indeed have taken a variety of approaches in concluding that injunction-bond security can be set at a figure that is not calculated to compensate, or even at zero. But the Style Project is not designed to decide whether this is the proper result.

Professor Burbank responded that since these problems are apparent, it may be better to remove Rule 65(c) from the Style Project entirely. Rather than restyle it, or included it in the package of Style Rules without change, it could be omitted entirely. Further consideration would occur in the ordinary process, leading to a substantively revised rule expressed in current Style conventions. We should not risk adopting a rule that requires an indigent or public-interest group to post security. Although courts do not struggle now — they simply evade the apparent command of present Rule 65(c) — and although no court has said that "the rule compels me to require adequate security although I think the rule wrong," the Style language will make it more difficult to achieve

desirable results.

Rule 65(d)(2)(C) points up two ambiguities in present Rule 65(d). The rule says that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with *them who receive actual notice of the order by personal service or otherwise*." There is no comma after "them," seeming to suggest that actual notice is required only as to persons acting in concert or participation — actual notice is not required as to a party or its officers, et cetera. And "them" is itself ambiguous — does it refer to concert or participation only with a party, or also with a party's officers — even its attorneys?

Professor Rowe noted that he had researched this question in response to the working group's comments and had discovered that this part of Rule 65 was adapted from former 28 U.S.C. § 363, a statute that disappeared with the 1948 codification of the Judicial Code. Section 363 had a comma after "them"; the most likely inference is that the original Advisory Committee simply made a mistake in carrying forward the statutory terms. It was suggested that the comma should be restored, with an explanation. The result is that even a party can be held in contempt only after actual notice of an injunction. There was no conclusion whether this step could be taken as part of the Style Project, so long as the Committee Note explains the restoration. It is important to mark this change and other changes in some manner so that people will be alerted to the fact that they can no longer rely on precedents construing the earlier rule language.

In terms of the Style Rule, the result would be to transpose words from subparagraph (C) to the introduction, something like this:

> **(2)** ***Persons Bound.*** The order binds only the following <u>who receive actual notice of the order by personal service or otherwise</u>:
>
> **(A)** the parties;
>
> **(B)** the parties' officers, agents, servants, employees, and attorneys; and
>
> **(C)** other persons ~~who receive actual notice of the order by personal service or otherwise and~~ who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

The second question posed by Style Rule 65(d)(2) arises from the final "or (B)." Does the present rule mean that an injunction is binding on a person who acts in concert or participation with a party's officer or like representative? Professor Burbank noted that Professor Hartnett's research will be sent along to the Committee. Professor Rowe noted that initial research had turned up nothing on the question whether an injunction binds a person acting in concert with a party's agent. There is a famous 1972 Fifth Circuit decision, U.S. v. Hall, 472 F.2d 261, 267, that relies on inherent power to bind a stranger to the injunction who is not acting in concert with a party or anyone related to a party. The court found that Rule 65(d) is only a partial codification of the contempt power. Apart from that decision, there is rhetoric in some opinions suggesting that concert with a party's officer is not enough, but no case that actually faces the question in a context that did not involve concert with a party's officer.

Further discussion briefly explored the question of inherent power in relation to an Enabling Act Rule. If a rule takes away a common-law or equitable power, that eliminates reliance on inherent power to thwart the power. But the interpretive question remains whether the rule was intended to do that. The binding reach of an injunction is an important question. It was generally agreed that a person who acts in concert with a party's agents should be bound. If the party is an artificial entity, indeed, the only way to act in concert with the party is through its agents — the distinction between concert with a party and concert with its agents vanishes, at least as to many of

its agents. (It is not as clear whether the distinction vanishes in the more remote reaches of Rule 65(d)(2) — a party's attorney, for example, presents questions quite different from a party's officer.)

Professor Burbank and Mr. Joseph seemed to agree that the Style Rule should say clearly that an injunction binds a person in active concert or participation with a party's agent. The important thing will be to adopt this provision in a way that makes it clear that the Style Rule resolves an ambiguity in the present rule. Resolving an ambiguity eliminates the possibility of divergent interpretations, an important step that should be made explicit.

Rule 66: Present Rule 66 governs administration of an estate by a receiver "appointed by the court." Clearly this applies only to a receiver appointed by the federal court. Style Rule 66 refers to a receiver "or a similar court-appointed officer"; it might be read to say that a state-court receiver must administer an estate according to the historical practice in federal courts or as provided in a local federal-court rule.

More importantly, present Rule 66 uses "practice" as a concept distinct from "administration." When it says that "[t]he practice in the administration of estates by receivers" accords with "the practice heretofore followed in the courts of the United States," it means that federal courts can apply federal standards for appointing a receiver, even in diversity cases. "Administration," on the other hand, refers to the receiver's dealing with the property. The Style Rule confuses this distinction by saying only that a receiver "must administer an estate according to the historical practice in federal courts." The distinction should be restored by falling back on most of the present second sentence: "The practice in the administration of estates by receivers or by other similar officers appointed by the court ~~shall~~ must ~~be in accordance~~ accord with the historical practice ~~heretofore followed~~ in ~~the courts of the United States~~ federal courts or as provided in ~~rules promulgated by the district courts~~ a local rule."

Rule 68: Professor Burbank pointed out that it seems to be agreed that Style Rule 68 inadvertently changed the time allowed for making a Rule 68 offer.

Professor Burbank further pointed out that Style Rule 68 may affect some of the existing uncertainties that surround Rule 68 offers of judgment. Can an offer be accepted without court approval in a class action? Must a court enter whatever equitable relief is proposed by an accepted offer? What happens when an offer is subject to conditions — for example, it is conditioned on acceptance by all plaintiffs, some plaintiffs accept while others reject, and judgment is then entered against all plaintiffs on terms less favorable to them than the offer terms? People will be looking for language that gives them an advantage in maintaining whatever position they prefer on these issues. Rule 68 "affects access to courts. Any change is troubling." Arguable changes of meaning also affect supersession questions with respect to statutes. One improvement might be to change the final sentence of Style Rule 68(a) to read: "Except in cases where court approval of the judgment is required, the court must then enter judgment." These words would make clear that Rule 23(e) still requires court approval to settle a class action, and that a court cannot be compelled through Rule 68 to enter and enforce an equitable decree that it would not approve on its own. Anyone who considers the question would agree that these propositions are correct. The only question, apart from further style attention to the suggested revision, is how to send notice that these questions are addressed by the Style Rule. Beyond those issues, however, the Style Project should not attempt to clarify Rule 68. Some see Rule 68 as a foundering ship. Others prefer a quicksand analogy. The Committee should be wary.

Concern was expressed that the proposed language referring to court approval might be interpreted to mean that a defendant can moot a plaintiff class action by making Rule 68 offers to

representative plaintiffs. We must be careful that the Style language does not affect this question. Professor Burbank suggested that the Committee Note might address this issue. He also noted again that there is a supersession question with respect to statutes that courts have relied upon to oust Rule 68.

Rule 23: Professor Burbank began by noting that the academic member of the team that focused on Rule 23 was Professor Janet Cooper Alexander. Many of her suggestions focus on the concern that such expressions as "class claims," replacing "claims of class members," will tend to focus on the class elements of the claims, as distinguished from the individual claims, with undesirable results. The shift of direction is subtle, but may cause a shift in understanding. One Committee member agreed with the suggestion — "there is a lot of practice" that should be preserved by going back to "members of the class."

It was noted that the restyling of Rule 23 had been approached with great restraint.

The next observation was similar to the "class claims" suggestion. Present Rule 23(a)(2) refers to "questions of law or fact common to the class." This language is not particularly important in (b)(3) classes because of the requirement that common questions predominate over questions affecting only individual class members. But it is important in (b)(1) or (2) classes. And the Style version, "questions of law or fact are common to the class," may invite an interpretation that requires that all questions be common to the class. It would be better to go back to the present language. Professor Burbank agreed.

Another comment agreed with the working group's suggestion that Style Rule 23(c)(4) should restore two words from the present rule: "an action may be brought or maintained as a class action with respect to particular issues." Additional agreement was expressed for this restoration.

A new issue was raised by the further suggestion that Style Rule 23(d)(1)(B) should change the form of "conduct." In the present rule, notice may be ordered "for the fair conduct of the action." "fairly conduct" in the Style Rule may not fully capture this. "fairly conducting" or some other form might be better.

Style Rule 23(d)(1)(B)(iii) refers to notice to class members of the opportunity "to inform the court" about representation. It would be better to revert to "signify to the court," drawing from the present language. A class member can signify by not opting out, by refraining from challenges or objections, and so on.

Style Rule 23(d)(2) was addressed by a similar comment. The present rule says that a Rule 23(d) order may be altered "from time to time." Although these words may seem redundant, they add a temporal dimension that should not be dropped.

A question of pure style also was asked: present Rule 23(c)(2)(B) refers to the best notice practicable. Style Rule 23(c)(2)(B) refers to the best notice "*that is* practicable." Do we need to add "that is"? Professor Kimble responded that there is no difference of meaning, but that the added words make it more readable.

Rule 26: Mr. Joseph began the report on Rule 26 by raising two global themes. The practice of subdividing Style rules down to romanet items as a level below subparagraphs was criticized, along with the practice of using bullets, as making citation and abbreviation unnecessarily difficult. This problem arises in many of the Style Rules. In addition, the structure is changed from the present rule — what was Rule 26(a)(1)(A) has become 26(a)(1)(A)(i), and so on. Although the new structure may be more satisfying in some ways, the redesignations will make computer searches more difficult.

Style Rule 26(a)(1)(A)(ii) was offered as an illustration of the failure to achieve exactly parallel wording in related provisions. Initial disclosure here includes "data compilations"; some of the parallel discovery rules do not.

The next specific point Mr. Joseph raised addresses Style Rule 26(a)(1)(A)(iv). The present rule requires disclosure of insurance agreements to "satisfy part or all of a judgment which may be entered in the action." The Style rule refers only to "a possible judgment." This change may invite disputes. A plaintiff will assert that it should see all of the defendant's policies so it can decide for itself whether it can argue that any of them cover the possible judgment. On the other hand, "a possible judgment" may be understood to refer only to a judgment on the claim in the present action. Such matters of style are raised to illustrate the ways in which seemingly innocuous changes may lead to unfounded assertions. "I don't want to get the phone calls."

Present Rule 26(a)(5), slated for abrogation, serves a real purpose. Although it seems no more than an index of discovery methods, it makes clear the status of Rule 36 and parts of Rule 45 as discovery devices. Several reported cases confirm the prevalence of arguments that Rule 36 requests to admit and Rule 45 subpoenas are not discovery devices and may be pursued after the close of the discovery period. Those are stupid arguments, but Rule 26(a)(5) helps to fend them off. It should be restored. It seems a matter of indifference whether it should be redrafted to refer to the discovery rules only by number, or instead should carry forward in its present word descriptions.

Mr. Joseph continued by noting that Style Rule 26(a)(2)(B)(vi) changes the meaning of present 26(a)(2)(B). The present rule requires that a trial expert witness's report include "the compensation to be paid for the study and testimony." This includes compensation paid for study by others that is used by the expert. The Style Rule refers only to "the witness's compensation for study and testimony in the case." That does not seem to cover compensation paid to others for studies in aid of the expert's testimony. The present meaning should be restored. One possibility would be to drop "witness's" from the Style Rule, but other adjustments would have be to made.

The Rule 26(e) duty to supplement disclosures and discovery responses now extends only to information "thereafter acquired." Deleting this limit from the Style Rule glosses over the distinction between the duty to correct and the duty to supplement. The duty to correct a response incorrect when given arises from Rule 26(g)(2). "Discovery always happens over time." The Style Rule "can be an invitation to produce at a later time," rather than produce at the first occasion a party recognizes the relevance and responsiveness of information. These problems arise constantly. One expression of agreement was that it is helpful to be able to point to "thereafter acquired" to show that a tardy response is not acceptable.

Mr. Joseph then pointed to Style Rule 26(g)(1)(B)(ii) as an example of a problem that occurs elsewhere as well, as in Rule 11. The present rule refers to increases "in the cost of litigation." The Style Rule refers to an increase of "the litigation costs." It is not clear that "cost of litigation" carries the same meaning as "litigation cost." Professor Rowe agreed that both phrases are used variably in statutes and in other settings. Professor Kimble noted that there is no semantic difference between these modes of expression, and asked whether the shorter formula would lead to misinterpretations. It was suggested that if the Style Rules continue to refer to litigation costs, the Committee Notes might note that usage is variable and that — at least for the Civil Rules — there is no difference of meaning.

Mr. Joseph noted a separate problem with Rule 26(g)(2). The final part of the present rule says that a party "shall not be obligated to take any action with respect to" an unsigned discovery

request, response, or objection. The Style Rule changes that to "has no duty to respond." "[R]espond" fairly covers the obligation to react to a discovery request. But it does not clearly cover action with respect to a discovery objection or response. The unsigned objection or response should be treated as a nullity; if, for example, there is a time limit to reply to an objection, the limit is not triggered by an unsigned objection.

Written Stipulation: Professor Burbank and Mr. Joseph then presented another global issue. At many points the Style Rules substitute "stipulation" for "written stipulation." There is a difference. People stipulate orally. And there may later be disagreement as to the existence of any stipulation, or as to the terms of the stipulation. It is good to require a writing to reduce transaction costs that arise both from good-faith disagreements and from deliberate maneuvering. In response to a question, they agreed that an e-mail message is a writing. The recommendation was that although there are a lot of variations in the present rules, it is better to stick to the present rule, whatever it may be. But perhaps if a rule requires that something be filed, it is unnecessary to remind that it need be a writing.

Rule 30(b)(5): There is no need to refer to camera or sound-recording techniques in Style Rule 30(b)(5); it is better to say that appearance or demeanor "must not be distorted through ~~camera or sound-~~ recording techniques."

Rule 30(f): Rule 30(f) presents two questions. One inheres in the present rule, which requires the officer to send the deposition "to the attorney who arranged for the transcript or recording." The Style Rule does not change this, but it does not work. Should it be sent to the attorney or to the party? What happens if a party arranges for a different mode of recording than that designated by the party who noticed the deposition — which recording is the deposition? Mr. Joseph answered that the deposition is the recording made by a court officer — there has to be someone who administers the oath. In his experience, video depositions are always transcribed; the transcription is considered the record — indeed, the reporter watches the video and produces a better transcript than emerges from a stenographically recorded deposition. A separate problem arises from the adoption of present Rule 5(d), which prohibits filing discovery materials until ordered by the court or used in the action, without changing the requirements in Rules 30 and 31 that the party taking a deposition give prompt notice of its filing.

Rule 30(a)(2): Present Rule 33(c) says that an interrogatory is "not necessarily" objectionable merely because an answer involves an opinion or contention. Style Rule 30(a)(2) says that it "is not" objectionable merely because. Having raised the issue, Mr. Joseph suggested that "maybe" the change is proper within the Style Project.

Rule 36(a)(5) and (6): As a matter purely of style, it was suggested that these two paragraphs should be combined into a single paragraph in order to reduce the proliferation of paragraphs.

Rule 37(b)(2)(A)(i): Mr. Joseph noted that other rules present the same issue. One of the sanctions for disobeying a discovery order under present Rule 37(b)(2)(A) is an order that facts are taken as established "in accordance with the claim of the party obtaining the order." The Style Rule changes this to "as the prevailing party claims." In context no one could actually misread this to refer to the party who ultimately prevails in the final judgment. "But they will argue anything." It is better to refer to the party who prevails on the motion.

Rule 37(c)(1): Two issues were identified. One is a problem simply carried forward from the present rule — "disclosed" is used twice in the first sentence to refer to different things. In the first appearance it refers to Rule 26(a) disclosures, while in the second appearance it refers both to Rule 26(a) disclosures and also to failure to supplement a discovery response. Various drafting solutions are possible; some have been suggested already. The other issue also carries forward from the

present rule. One sanction bars use as evidence on a motion, at a hearing, or at trial. Care must be taken in drafting to ensure that the information may be used at a hearing to determine whether a Rule 37(c)(1) sanction should be imposed and to decide what the sanction should be.

Rule 45(a)(3): The present rule authorizes an attorney to issue a subpoena "on behalf of" a court. The Style Rule says "from" a court. "From" may suggest that the attorney must persuade the court to issue it, contrary to the rule's purpose. It was pointed out that "in" behalf of the court has a different meaning from "on" behalf of the court. "For" was suggested, but resisted on the ground that it sounds awkward to say that the attorney is acting for the court.

Rule 45(b)(1): This Rule raises the general issue of cross-references. The present rule calls for service "in the manner prescribed by Rule 5(b)." Rule 5 itself makes clear that it governs service; the cross-reference is not necessary. But the cross-reference saves time by answering a question that otherwise might require a search.

Rule 45(c)(2)(B)(ii): The present rule says that when a person commanded by a subpoena to produce materials objects, the party serving the subpoena is "not entitled to inspect and copy" until it obtains a court order. Style Rule 45(c)(2)(B)(ii) says that "inspection and copying may be done only as directed in the order." That may carry an implication that the parties cannot resolve the dispute by agreement. One acceptable change would be: "(ii) ~~Inspection and copying may be done only~~ The serving party is not entitled to inspect or copy except as directed in the order * * *."

Rule 7(a)(7): Present Rule 7(a) characterizes the pleading that responds to a counterclaim as a "reply." It authorizes a court to order a "reply" to an "answer," but does not authorize an order to reply to a reply. By changing the characterization of the response to a counterclaim to "answer," the Style Rule authorizes the court to order a reply to the response to the counterclaim. This is a change of practice. It is not "earth-shaking."

Rule 8(a): A Committee member observed that present Rule 8(a) applies to a pleading that "sets forth a claim for relief," while Style Rule 8(a) applies to a pleading that "states a claim for relief." "sets forth" may sound old-fashioned, but "states" invites confusion with the Rule 12(b)(6) focus on failure to "state a claim upon which relief can be granted." Some other word should be found; perhaps "makes a claim" would do.

Rule 8(a)(3): Professor David Shapiro, who was the academic on the team that reviewed Rule 8, believes that "for judgment" should be restored from the present rule: "a demand for judgment for the relief sought. Judgment is what counts. Separately, he believes the Style-Substance change is a mistake. "relief in the alternative" is a term of art that encompasses an important proposition that should not be reduced to "alternative forms * * * of relief."

Rule 8(c)(2): Mr. Joseph pointed out that the 19 enumerated affirmative defenses are set out by so many "bullets," and expressed abhorrence for bullet designations.

Rule 8(d)(3): Professor Burbank urged that the reference to Rule 11 should be retained. It is particularly important to have this reminder in a rule that authorizes inconsistent claims or defenses.

Rule 9(a)(2): The first suggestion was that "denial" is not a good choice for a pleading that raises the question of an adversary's capacity, authority to sue in a representative capacity, or legal existence. The initial pleading need not plead these things, so there is nothing to "deny." The present rule describes the response as a "specific negative averment." Beyond that, Professor Shapiro is clear that the rule should recognize that the party questioning any of these elements may not have any supporting facts. The proposed solution: "must do so by a specific ~~denial, which must state~~ statement setting out any supporting facts that are peculiarly within the party's knowledge."

November 22 draft

A Committee member raised a pure style question. Style Rule 9(a)(1) lists a number of matters that need not be alleged. (a)(2) then says "to raise any of *those* issues." "those" requires the reader to go back to (1); it may be better to repeat the list in (2). "This" and "those" are inherently ambiguous. An alternative might be to cross-refer to (1), but that too makes the reader go back.

Rule 10(c): The present rule refers to a writing "which is an exhibit." Mr. Joseph suggested that "exhibit" should be restored, and noted the difficulty of discerning what is "attached" to a pleading in electronic filing.

Rule 11(c)(3): Mr. Joseph raised another global style issue: the Style Rules refer to action taken by the court without motion as "on its own," deleting the common "initiative." It would be better to restore "initiative." But it was observed that in most of the Style Rules the phrase is "on motion or on its own," leaving no doubt about the meaning. In the end it was agreed that this is a style choice.

Rule 12(h)(2): The present rule clearly preserves only an objection of failure to join a party indispensable under Rule 19(b); the Style Rule faithfully carries that forward. But Professor Burbank observed that at least one treatise says that this is a mistake — that failure to join any Rule 19 party should be preserved despite omission from a motion or responsive pleading. Perhaps this question should be added to the "reform" agenda.

Rule 12(h)(3): Professor Burbank suggested that present Rule 12(h)(3) is a mess; the mess is carried forward in the Style Rule. It does not recognize the doctrines that permit jurisdiction to be established even though it could not be supported at the time of the initial filing or removal. It implies that an improperly removed action should be dismissed, not remanded. Professor Shapiro suggested that the Style Rule may raise supersession issues, but Professor Burbank thinks not — Enabling Act Rules cannot affect jurisdiction, as recognized by Rule 82. Perhaps the Committee Note could recognize that there are problems not addressed by the Style Project. A response was that it might be better to note these problems in the memorandum transmitting the Style Project — Committee Notes ordinarily are not used to describe problems that are not addressed by the associated rule amendment.

Rule 13(b): The working group comment suggests that Style Rule 13(b), by stating that a pleading may state any claim as a counterclaim, may undermine the compulsory counterclaim provisions of Rule 13(a). Neither Professor Burbank nor Mr. Joseph share this concern.

Rule 15(c)(3): Professor Burbank noted that there are real problems with Rule 15(c)(3), but that they likely are beyond the reach of the Style Project.

Rules 61, 80: Mr. Joseph noted that Rules 61 and 80 present problems of the relationships between the Civil Rules and statutes. Both address evidence issues. But the Evidence Rules are for most part statutes, originally enacted by Congress. So Evidence Rule 103(a) says that error may not be predicated on a ruling unless a "substantial right" is affected. Style Rule 61 begins by stating that no error in admitting or excluding evidence is a ground for relief "[u]nless justice requires otherwise." It is only the second sentence of Style Rule 61 that says that the court must at every stage disregard all errors "that do not affect any party's substantial rights." There are linguistic differences, even if there is no intended change of meaning. So too, Evidence Rule 103(d) embodies a "plain error" standard that is not referred to in present or Style Rule 61. One Committee member suggested that Criminal Rule 52, a plain-error rule, may have looked to Evidence Rule 103(d) in restyling. Mr. Joseph concluded by observing that the working group was simply identifying the issue.

Mr. Joseph then suggested that Style Rule 80 really does not work. The person who recorded the testimony may not be competent to certify the transcript. There is no real need for this provision.

Rather than revert to the present rule, which refers only to stenographic reporting, there would be no harm in simply dropping Rule 80. Others suggested that perhaps Rule 80 should be retained, to be reconsidered in the context of a broader project to review the Civil Rules provisions on evidence for better integration with the Evidence Rules. It was further noted that Rule 80 should not be confused with possible evidentiary uses of deposition testimony — it addresses only testimony "at a trial or hearing." That might include an administrative hearing, or a state-court trial or hearing. The problems of various recording methods may not be as acute as they would be if deposition testimony were included. At the end, Mr. Joseph suggested that Style Rule 80 would be appropriate if it refers only to stenographically recorded testimony.

Rules 72, 73: Professor Burbank noted that Professor Linda Silberman, who was involved in drafting the original versions of Rules 72 and 73, was directed to follow the language of the magistrate-judge statute, and still thinks that is a good idea. Perhaps style conventions should not trump fealty to the statutory language here. To be sure, it was a new statute at the time, and one purpose of adhering to the statutory language may have been to serve a "teaching" purpose. They may have wanted to be sure they were not changing anything. That purpose may not be as important now. If we can be sure that there are no possible changes of meaning, and no significant transaction costs arising from transitional confusion or efforts to create confusion, the Style changes may be appropriate. So, it was noted, the Criminal Rules have adhered to the Civil Style drafts.

Rule 36(b): Professor Burbank noted that the Style-Substance proposal to amend Rule 36(b) presents a problem. The present rule permits amendment of an admission "[s]ubject to the provisions of Rule 16 governing amendment of a pre-trial order." Present Rule 16(e) states two different things about amending a pretrial order. First it provides generally that an order reciting the action taken at a Rule 16 conference "shall control the subsequent course of the action unless modified by a subsequent order." That provision does not establish any standard for modification; it simply recognizes that modification may occur. The second provision is that an order following a final pretrial conference "shall be modified only to prevent manifest injustice." The Style Rules divide these two provisions between Style Rule 16(d) and (e). The Style-Substance proposal is to limit Rule 36(b) to an order permitting withdrawal or amendment of an admission "that has not been incorporated in a pretrial order." The result is that there is no standard for withdrawal or amendment of an admission that has been incorporated in a pretrial order before the final pretrial order. The appropriate rule instead should be that the Rule 36(b) standard governs withdrawal or amendment except as to an admission that has been incorporated in a final pretrial order. Withdrawal or amendment of an admission incorporated in a final pretrial order should be governed by the more demanding standard of Style Rule 16(e).

Overall Evaluation: A Committee Member asked Professor Burbank and Mr. Joseph to comment on their written summary of the working group's views on the wisdom of undertaking the Style Project. Professor Burbank replied that the group was divided. Fourteen members participated in the final conference call. Of them, nine believed that the project should not be carried to a conclusion, while five believed that the advantages of adopting the Style Rules outweigh the costs that will be entailed. The strength of their convictions varied. Some thought the goals of the project are admirable, but were concerned that there are not insignificant problems even in light of the perception that the Styled Appellate Rules and Criminal Rules work. The problems that can be identified now can be fixed now. But there will be other problems that are not identified. And there will be transaction costs as lawyers attempt to bend the Style Rules by arguing for unintended changes of meaning. In addition, there is an opportunity cost in losing the occasion for addressing the entire corpus of rules by asking whether the present Federal Rules of Civil Procedure embody the right procedure for the 21st Century.

Mr. Joseph added that the transaction costs include even such mundane things as changes in the designations of rule subparts — every time there is a search, there is an extra cost in connecting the search to the former designations.

A first response was that the Style Project was sensitive to the problems of changing designations. The numbers of the rules were left unchanged, even though that means retaining decimal numbers, and the most famous designations — such as Rule 12(b)(6) — were retained. And an effort was made to ensure that such changes as were made were justified. Those changes will continue to be reviewed as the Project carries forward.

In response to a question, Professor Burbank said that the opportunity cost of the Style Project is loss of the resources to consider the adequacy of the Civil Rules as a whole. The loss is not merely a loss of Committee time and energy. The bar cannot be asked to adapt to a complete rewriting of the rules more than once in a generation. Adoption of the Style Project will foreclose the opportunity to engage in a second massive rewriting, this time for substantive reasons, in the close-term future. Of course that is not a cost if such a broad project would not be undertaken in any event.

Judge Rosenthal concluded the hearing by noting that the immediate task is to make the Style Rules as good as can be. The best possible product can then be compared to the concerns about implementation costs and a judgment made whether the improvements are so clear as to justify the costs. She repeated that the Committee is immensely grateful to the working group, and particularly to Professor Burbank and Mr. Joseph, for the immense work they have devoted to this project.

RECOGNITION OF JUDGE SCHEINDLIN

Judge Rosenthal presented to Judge Scheindlin a plaque recognizing and appreciating her service as an Advisory Committee member. Committee members regularly live up to and earn these expressions of appreciation, but Judge Scheindlin has earned them as completely as anyone can.

NOTES ON COMMITTEE MEETING

Judge Rosenthal opened discussion of the approach to be taken in adapting the published Style Rules to public comments. The comments provided by the working group organized by Professor Burbank and Gregory Joseph are likely to be at least as complete and thorough as any. Only a few other comments have been provided at present. A bar group in New York is working on the rules and may provide a comprehensive report. Other comments may appear as well, but it remains difficult to predict their sources or character.

It remains necessary to adapt the Style Rules to incorporate the rules changes that are now pending in the Supreme Court, on track to take effect on December 1, 2006. Professor Marcus did this for the electronic discovery rules as they stood in the early stages, and will be responsible for the first draft that adjusts for the rules that were transmitted to the Court.

A tentative schedule for further work by the Reporter and consultants was discussed, recognizing that the schedule will be affected by the final choice of the dates for the spring meeting. If the spring meeting is scheduled for late April or early May, it may be possible to go as late as January 30 to get a comprehensive draft to the Style Subcommittee. The next step, by mid-February, will be transmission to the Advisory Committee Subcommittees A and B. By mid-March the Subcommittee reports and the research that may remain to be done by Professors Marcus and Rowe should be delivered to the Reporter, for preparation of a final package for the Advisory Committee by the beginning of April. The hope will be to prepare a package that will leave few issues to be resolved by the full Advisory Committee, and to leave enough time before the spring meeting to

gather reactions on the issues that remain to be resolved. A final timetable will be prepared after setting the date for the spring meeting.

A cover memorandum must be prepared to address the larger issues, exploring the balance between the advantages of clearly written rules and the cost of adjusting to clarity. The arguments for and against proceeding toward final adoption of the Style Package must be developed in full and weighed with care.

Many of the working group comments on the Style Rules suggested that some issues should be taken out of the general Style package and included in the "Style-Substance" track. Discussion began by asking just what would this move affect? The two tracks have been published, but for simultaneous public comment. As the project moves forward, the value of separate presentation will diminish continually. There would be a real difference if a rule or subdivision were withdrawn entirely from the Style Project, leaving it for separate development later in the ordinary course of rules amendments. There also might a difference if distinctions were to be drawn by some device that identifies the Style Rules amendments as changes that do not affect the supersession consequences of any of the rules. It would be possible to say that the pure Style Rules do not affect supersession, while the Style-Substance Rules do. But there is no point in saying it. The Style-Substance Rules are not intended to affect supersession, and there is no plausible reason to suspect that they might. These changes were proposed now primarily because they seemed so simple and insignificant that they would not be likely to be addressed separately in the future. The practice with the Criminal Rules was to combine the separate tracks into a single package after the Judicial Conference approved the rules for transmission to the Supreme Court. It was agreed that nothing is likely to be gained now by transferring proposals originally made in the Style Rules into the Style-Substance package for consideration in tandem as part of what in any event will become a single package.

The work of the other Subcommittees appointed after the October meeting also was discussed. It seems likely that they will begin work in January, aiming toward reports to the Committee at the spring meeting. The reports, however, need not be in the form of draft rules proposed for publication in 2006. The questions often present difficult issues, whether as focused as Rule 15 or as general as summary judgment and notice pleading. It may prove that publishable proposals can be developed on some of these issues by spring, but the immediate task is to develop a better-focused sense of the issues that are likely to support workable proposals.

It was noted that various bar groups will be consulted for views on the possible need to revise the Rule 30(b)(6) provisions for deposing an organization.

12-F

B. RULES RECOMMENDED FOR PUBLICATION

1. Rule 6(a)

Rule 6(a) is recommended for publication after the time required for each Advisory Committee to complete the work of reviewing all of the time periods set out in each set of Rules.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 6. Computing and Extending Time

1 **(a) Computing Time.** The following rules apply in
2 computing any time period specified in these rules or in any
3 local rule, court order, or statute.

4 **(1)** ***Period Stated in Days.*** When the period is stated in
5 days,

6 **(A)** exclude the day of the act, event, or default that
7 triggers the period;

8 **(B)** count every day, including intermediate
9 Saturdays, Sundays, and legal holidays; and

10 **(C)** include the last day of the period unless it is a
11 Saturday, Sunday, legal holiday, or — if the act to be
12 done is filing a paper in court — a day on which
13 weather or other conditions make the clerk's office
14 inaccessible. When the last day is excluded, the

15 period continues to run until the end of the next day
16 that is not a Saturday, Sunday, legal holiday, or day
17 when the clerk's office is inaccessible.

18 **(2)** ***Period Stated in Hours.*** When the period is stated
19 in hours,

20 **(A)** begin counting immediately on the occurrence
21 of the act, event, or default that triggers the period;

22 **(B)** count every hour, including hours during
23 intermediate Saturdays, Sundays, and legal holidays;
24 and

25 **(C)** if the period would end at a time on a Saturday,
26 Sunday, legal holiday, or — if the act to be done is
27 filing a paper in court — a day on which weather or
28 other conditions make the clerk's office
29 inaccessible, then continue the period until the same
30 time on the next day that is not a Saturday, Sunday,
31 legal holiday, or day when the clerk's office is
32 inaccessible.

33 **(3)** ***"Legal Holiday" Defined.*** "Legal holiday" means:

34 **(A)** the day set aside by statute for observing
35 New Year's Day, Martin Luther King Jr.'s
36 Birthday, Washington's Birthday,
37 Memorial Day, Independence Day, Labor
38 Day, Columbus Day, Veterans' Day,
39 Thanksgiving Day, or Christmas Day; and

40 **(B)** any other day declared a holiday by the
41 President, Congress, or the state where the
42 district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period needs to be computed. They do not apply when a fixed time to act is set. If, for example, a rule or order requires that a paper be filed "no later than November 1, 2007," then the paper is due on November 1, 2007. But if a rule or order requires that a paper be filed "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. (It also applies to the rare time periods that are stated in weeks, months, or years. See, e.g., Fed. R. Evid. 901(b)(8).)

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of 10 days or less. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the act, event, or default that triggers the deadline is not counted. Every other day — including intermediate Saturdays, Sundays, and legal holidays — is counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. (When the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.) Thus, a paper that must be filed within 10 days after the entry of an order on Tuesday, August 21, 2007, is due on Friday, August 31, 2007. But a paper that must be filed within 10 days after the entry of an order on Wednesday, August 22, 2007, is not due until Tuesday, September 4, 2007, because the tenth day (September 1) is a Saturday and Monday (September 3) is Labor Day.

The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an act, event, or default. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an act, event, or default. See,

e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a paper is due within 10 days *after* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Monday, March 17. But if a paper is due 10 days *before* an event, and the tenth day falls on Saturday, March 15, then the paper is due on Friday, March 14.

Periods previously expressed as 10 days or less will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, see, e.g., 28 U.S.C. § 3771(d)(3), as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the act, event, or default that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:00 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:00 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. (Again, when the act to be done is filing a paper in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday.)

Subdivision (a)(3). New subdivision (a)(3) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

FEDERAL RULES OF CIVIL PROCEDURE

Discussion

Rule 6(a) is the Rule chosen by the Time-Computation Subcommittee to illustrate the template developed for each of the rules that governs the computation of time periods. A central purpose of the Time-Computation Project is to achieve a uniform method of computing time. Simplicity is as important as uniformity. To that end, the template eliminates the "eleven-day" rule that excluded intermediate Saturdays, Sundays, and legal holidays in calculating periods shorter than eleven days. The template also adds a provision for calculating periods expressed in hours. It carries forward the familiar rule that the day from which a period starts to run is excluded, and the final day is included, and seeks to clarify application of this rule to periods that run "backward" from a stated event. The Civil Rules Committee approves all of these recommendations.

Abolition of the eleven-day rule will require each Advisory Committee to reconsider all of the time periods set at less than eleven days. The Civil Rules include many examples, ranging from one day to several periods set at ten days. Every period now set at five days or longer is effectively shortened by the direction to count Saturdays, Sundays, and legal holidays. Shorter periods may or may not be affected, depending on the day that starts the period. Abolition also may require reconsideration of local rules that set time periods at ten days or less. The Appellate Rules Committee has pointed out that there is no easy answer to the questions raised by statutes that set time periods at ten days or less. The Civil Rules Committee discussion of statutory time periods, as described in the draft Minutes, identified difficulties more than solutions.

The Time-Computation Subcommittee sought advice on two questions that should be resolved before eventual publication of Rule 6(a).

One of these questions addresses the Rule 6(a) provisions that extend the period for filing a "paper" in court if the period ends on "a day on which weather or other conditions make the clerk's office inaccessible." Adaptation of this rule to electronic filing is not easy. The court's system may become unable to accept electronic filings. Or a party may rely on electronic filing at the final minute, only to find that its own system has failed. The Civil Rules Committee recommends that the Technology Subcommittee consider these questions. Pending further guidance, the tentative approach to Rule 6(a) will be to adopt open terms that are not limited to physical inaccessibility but that do not directly address e-filing mishaps. The reference to filing a "paper" will be changed to neutral "filing." Nothing will be said about problems with the filer's system. Further elaboration is set out in the draft Minutes.

The other question identified by the Time-Computation Subcommittee arises from Rule 6(e)'s provision that adds three days to respond after service by any means other than personal service. This provision began with the need to recognize the time required to deliver traditional physical mail in conjunction with the rule that service is effective on mailing. It has been extended to modes of service speedier than traditional mail, including electronic service. These modes of service do not invariably provide instantaneous or even next-day delivery, but that consideration may not of itself justify an additional three days to respond. The decision whether to allow additional time, however, is also affected by the fear that some lawyers choose the mode of service for the tactical purpose of minimizing the time available to respond. The Civil Rules Committee reached no recommendation on this question.

Three other general questions were raised in discussing the general provisions of Rule 6.

Rule 6(a) excludes the last day of a period if it is a legal holiday, and includes in the exclusion a day declared a holiday by the state where the district court is located. The district court may well be open on such a day. On the other hand, the cases show the difficulties that arise when a district court closes on a day that is not a legal holiday within any part of the Rule 6(a) definition. Local directives may close the court on a day next to a legal holiday — the Friday after Thanksgiving is one illustration. It might be useful to change this rule to account for days on which the clerk's office is closed. At the same time, it is important to remember that a widely observed local holiday may be so ingrained that lawyers will not pause to ask whether it is also observed by the federal courts.

A second question asks whether it is possible to define the end of the "day" in the national rules. Many courts accept electronic filing up to midnight. As electronic filing becomes universal, it might be possible to address this issue in the national rules. Some courts also accept paper filings after the clerk's office is closed, relying on a "drop box." That practice does not seem as likely to be suitable for a national rule — local circumstances may affect the feasibility of this practice. Perhaps the Time-Computation Subcommittee can help the advisory committees address this common question.

A third question arises from the Rule 6(b) direction that the court cannot extend the times set for a number of post-judgment motions. This provision responds to important needs and probably should not be revised. It must be recognized, however, that it continues to cause not only loss of the opportunity to seek post-judgment relief but also may cause loss of the right to appeal when combined with the rule that only a timely motion suspends appeal time. This question will be considered. Other Advisory Committees may wish to participate in the process.

The Advisory Committee has divided into two subcommittees to consider the individual time periods set in the Civil Rules. It has concluded that the task should be approached without any general assumption that the periods are generally too short or too long. The focus instead will be on the practical realities attached to each rule. In refining the periods, however, a preference will be given to setting time in multiples of seven days. This approach will reduce the occasions on which it is necessary to exclude a final day that is a Saturday or Sunday.

2. Rules 13(f) and 15(a)

Related amendments of Rules 13(f) and 15(a) are recommended for publication at some time after August, 2006 — most likely as part of a larger package in August, 2007. The changes are shown in the Style Rule form:

Rule 13. Counterclaim and Crossclaim

* * * * *

1 ~~**(f) Omitted Counterclaim.** The court may permit a party to~~

2 ~~amend a pleading to add a counterclaim if it was~~

3 ~~omitted through oversight, inadvertence, or excusable~~

4 ~~neglect or if justice so requires.~~

Committee Note

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered — as they should be — according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). See *6 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d, § 1430*. Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

Rule 15. Amended and Supplemental Pleadings

1 **(a) Amendments Before Trial.**

1 **(1) Amending as a Matter of Course.** A party may
2 amend its pleading once as a matter of course within:

3 **(A)**~~before being served with a responsive~~
4 ~~pleading;~~ 21 days after serving it, or

5 **(B)** ~~within 20 days after serving the pleading~~
6 ~~if a responsive pleading is not allowed and the~~
7 ~~action is not yet on the trial calendar~~ if the
8 pleading is one to which a responsive pleading
9 is required, 21 days after service of a
10 responsive pleading or 21 days after service of
11 a motion under Rule 12(b), (e), or (f),
12 whichever is earlier.

13 * * * * *

Committee Note

Rule 15(a) is amended to make three changes in the time allowed to make one amendment as a matter of course.

Former Rule 15(a) addressed amendment of a pleading to which a responsive pleading is required by distinguishing between the means used to challenge the pleading. Serving a responsive pleading terminated the right to amend. Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a "pleading" as defined in Rule 7. The right to amend survived throughout the time required to decide the motion and indeed

survived beyond decision of the motion unless the decision expressly cut off the right to amend.

The distinction drawn in former Rule 15(a) is changed in two ways. First, the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f). This provision will force the pleader to consider carefully and promptly the wisdom of amending to meet the arguments in the motion. A responsive amendment may avoid the need to decide the motion or at least reduce the number of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim. It also should advance other pretrial proceedings.

Second, the right to amend once as a matter of course is no longer terminated by service of a responsive pleading. The responsive pleading may point out issues that the original pleader had not considered and persuade the pleader that amendment is wise. Just as amendment was permitted by former Rule 15(a) in response to a motion, so the amended rule permits one amendment as a matter of course in response to a responsive pleading. The right is subject to the same 21-day limit as the right to amend in response to a motion.

The 21-day periods to amend once as a matter of course after service of a responsive pleading or after service of a designated motion are not cumulative. If a responsive pleading is served after one of the designated motions is served, for example, there is no new 21-day period.

Finally, amended Rule 15(a) extends from 20 to 21 days the period to amend a pleading to which no responsive pleading is allowed and omits the provision that cut off the right if the action is on the trial calendar. Rule 40 no longer refers to a trial calendar,* and many courts have abandoned formal trial calendars. It is more effective to rely on scheduling orders or other pretrial directions to establish time limits for amendment in the few situations that otherwise might allow one amendment as a matter of course at a time

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* This statement anticipates adoption of Style Rule 40 — or Style-Substance Rule 40 — on December 1, 2007.

that would disrupt trial preparations. Leave to amend still can be sought under Rule 15(a)(2), or at and after trial under Rule 15(b).

Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

Discussion

Rule 15 has been on the Committee agenda for several years. Several possible amendments have been considered by two subcommittees. The current recommendations result from careful work by a subcommittee chaired by Judge Michael Baylson. The Committee Notes provide most of the discussion needed to explain the proposed amendments. The decision to go no further deserves brief separate discussion.

Present Rule 15(a) presents a clear distinction between the events that cut off the right to amend once as a matter of course a pleading to which a responsive pleading is required. Service of a responsive pleading terminates the right to amend. Service of a motion that attacks the pleading does not. Instead the right to amend survives the motion, argument of the motion, deliberation by the court, and — on terms that vary somewhat among the courts — even a decision granting the motion. The reasons that might justify this distinction remain a puzzle. The proposed amendment eliminates the distinction. The pleader may amend once as a matter of course within 21 days after service of a responsive pleading or of a motion under Rule 12(b), (e), or (f). No matter which method is used to challenge the pleading, the pleader is given an opportunity to recognize the cogency of the challenge and to make an amendment. This opportunity is not likely to create additional work for the adversary or courts — to the contrary, it is likely that a motion for leave to make the same amendment would simply add unnecessary work because most such motions will be granted. Nor is it likely that pleaders will respond with thoughtless amendments — after a first amendment has been made, the burden of winning leave for a second amendment will be greater.

Rule 13(f) now provides that the court may permit a party to "amend a pleading to add a counterclaim." The Style Project considered deleting this rule as redundant with Rule 15, but concluded that the change might be challenged as substantive. Despite the different language, however, there is no apparent reason to believe that courts apply different standards when an amendment seeks to add a counterclaim than when an amendment seeks to add a claim or crossclaim, or to make other changes. Nor is there any apparent reason to apply different standards. The existence of this provision, moreover, generates uncertainty whether a Rule 13(f) amendment is eligible for relation back under Rule 15(c). Abrogation will bring all pleading amendments within Rule 15.

The Subcommittee divided on the question whether to propose amendments to Rule 15(c). Close textual analysis reveals a host of problems with the rule as written. But there is no indication in the reported cases that any of these problems have caused difficulties in practice. Work on Rule

15(c), further, would reopen serious questions. The first provision allows an amendment to relate back to the date of the pleading being amended when applicable limitations law allows relation back. The following provisions allow relation back despite the fact that applicable limitations law does not allow relation back. Relation back still can be justified to cure errors that are fairly characterized as procedural. But the line between providing ameliorative procedure and creating new limitations rules is thin. After exploring both narrow and broad proposals to amend the provisions that now appear in Rule 15(c)(2) and (3) (Style Rule 15(c)(1)(B) and (C)), the Committee decided to decline further work on Rule 15. The discussion is elaborated in the draft Minutes.

FEDERAL RULES OF CIVIL PROCEDURE

3. Rule 48: Jury Polling

Rule 48(c) is recommended for publication at the same time as the amendments proposed for Rule 13(f) and 15, and as new Rule 62.1:

Rule 48. Number of Jurors; Verdict; Polling

1 **(a) Number of Jurors.** A jury must begin with at least 6 and
2 no more than 12 members, and each juror must participate in
3 the verdict unless excused under Rule 47(c).
4 **(b) Verdict.** Unless the parties stipulate otherwise, the
5 verdict must be unanimous and must be returned by a jury of
6 at least 6 members.
7 **(c) Polling.** After a verdict is returned but before the jury is
8 discharged, the court must on a party's request, or may on its
9 own, poll the jurors individually. If the poll reveals a lack of
10 unanimity or assent by the number of jurors required by the
11 parties' stipulation, the court may direct the jury to deliberate
12 further or may order a new trial.

Committee Note

Jury polling is added as new subdivision (c), which is drawn from Criminal Rule 31(d) with minor revisions to reflect Civil Rules Style and the parties' opportunity to stipulate to a nonunanimous verdict.

Discussion

Consideration of adding a provision for jury polling was suggested during Standing Committee discussion a few meetings ago. Criminal Rule 31(d) provides a good model that is adopted for this recommendation. One departure is required to account for the parties' opportunity to stipulate to a nonunanimous verdict. And a style departure was made by referring to ordering a new trial rather than declaring a mistrial and discharging the jury. The Civil Rules consistently refer to a new trial; the closest illustration in rules sequence is Rule 49(b), which deals with the similar problem of inconsistencies when a general verdict is supplemented by interrogatories.

Jury polling is occasionally resisted on the ground that it may lead to frequent retrials. The Federal Judicial Center gathered figures on more than 100,000 jury trials over the 25 years from 1980 to 2004. Fewer than 1% of these trials resulted in a hung jury. This figure suggests that the likely risk is not great.

4. Rule 62.1: "Indicative Rulings"

New Rule 62.1 is recommended for adoption:

Rule 62.1 Indicative Rulings

1 **(a) Motion For Relief Pending Appeal.** If a timely motion
2 is made for relief that the court lacks authority to grant
3 because of an appeal that has been docketed and is pending,
4 the court may:
5 **(1)** defer consideration of the motion;
6 **(2)** deny the motion; or
7 **(3)** indicate that it [might][would] grant the motion if
8 the appellate court should remand for that purpose.
9 **(b) Notice to Appellate Court.** The movant must notify the
10 clerk of the appellate court when the motion is filed and when
11 the district court acts on the motion.

12 **(c) Remand.** If the district court indicates that it
13 [might][would] grant the motion, the appellate court may
14 remand the action to the district court.

Committee Note

This new rule adopts and generalizes the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant a Rule 60(b) motion. But it can entertain the motion and either deny it or indicate that it [might] [would] grant the motion if the action is remanded.

This clear procedure is helpful whenever relief is sought from an order that the court cannot revise because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the "indicative ruling" procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the clerk of the appellate court when the motion is filed in the district court and again when the district court rules on the motion. If the district court indicates that it might grant the motion, the movant may ask the appellate court to remand the action so that the district court can make its final ruling on the motion. Remand is in the appellate court's discretion. The appellate court may remand all proceedings, or may remand for the sole purpose of ruling on the motion while

retaining jurisdiction to proceed with the appeal after the district court rules if any party wishes to proceed. [The district court is not bound to grant the motion after indicating that it might do so; further proceedings on remand may show that the motion ought not be granted.]

Discussion

New rule 62.1 responds to a suggestion made by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any new rule provision would be better included in the Civil Rules because the underlying question involves district court authority to act while an appeal is pending.

The basic approach recommended in this proposal is borrowed from the procedure followed when a Rule 60(b) motion is made for relief from a judgment while an appeal from the judgment is pending. The courts of appeals recognize that the appeal defeats district-court "jurisdiction" to grant the motion. But they all rule that the district court can consider the motion. Most agree that the district court retains jurisdiction to deny the motion. But all agree that the district court lacks "jurisdiction" to grant the motion. If the district court concludes that the motion should be granted, it can indicate that it would do so if the case is remanded for that purpose. (At least one circuit also requires a remand to establish authority to deny the motion after the district court indicates that it would deny if the case is remanded. And another court at times chooses to vacate the judgment with leave to reinstate the appeal after the district court acts on remand.)

The common Rule 60(b) procedure is satisfactory. It honors the wisdom of the rule that only one court should have control of a case at one time. It recognizes that the time to move under Rule 60(b) is not suspended by a pending appeal, so that the motion often must be made or lost before the appeal is decided. The refusal to suspend the time to move in turn rests on the importance of prompt inquiry into many of the issues that may be raised by such motions.

Although it is well established, the procedure incident to a Rule 60(b) motion made pending appeal is often overlooked by lawyers. Some district judges have been unaware of its existence. It would be useful to write this procedure into Rule 60(b) to make it well known, to make it consistent across all courts, and to provide some useful procedural incidents such as the movant's duty to inform the court of appeals both when the motion is made and again when the district court acts on the motion.

The proposal goes beyond Rule 60(b) motions, generalizing the procedure to embrace any order that the district court lacks authority to revise because of a pending appeal. The orders most likely to be caught up in the broader rule will be interlocutory orders with respect to injunctions. Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish district-court authority to act despite a pending appeal, and indeed seem to indicate that relief should be sought first in the district

court. Several courts of appeals, however, do not read those rules as they seem to be written. See 16 Federal Practice & Procedure: Jurisdiction 2d, § 3921.2. pp. 59-64. Rule 62.1 will provide an alternative path to district-court action in those circuits. And it will provide a clear source of authority for more exotic combinations of appeals taken while the district court continues to proceed with respect to matters not subject to the appeal.

Rule 62.1 does not attempt the difficult task of defining the circumstances in which a pending appeal ousts district-court power to act on a motion. It is drafted to apply only when an independent source of authority establishes the district court's lack of power.

The recommendation contemplates publication in a form that seeks comment on alternative wording. The question is whether the district court should be able to indicate that it believes the case should be remanded without committing itself to revise the order. One rule text version allows the district court to indicate that it "might" grant relief. The other version requires the district court to indicate that it "would" grant relief. The argument for insisting that the district court indicate that it "would" grant relief is that a case should be remanded, interrupting the progress of the appeal, only after the district court has invested the time and energy — and imposed the burden on the parties — required to reach final decision on the motion. The argument for recognizing authority to indicate that the district court "might" grant relief is that this approach better integrates the resources of both courts. Initial consideration may persuade the district court that the motion raised important questions, but that final resolution will require a heavy investment that should not be made without assurance that the court of appeals will not decide the appeal — perhaps mooting or changing the inquiry — before the inquiry is complete, or else refuse to remand after the district court indicates that it would grant the motion. Once the district court indicates that it might grant the motion, and explains the reasons why the issues seem important but too difficult to pursue to completion without a remand, the court of appeals has control. The court of appeals can balance the district court's statement of the reasons that support remand against the progress of the appeal and its own deliberations. These arguments would be summarized in the message transmitting the proposal for publication, with a request for comment on the choice.

II Information Items

A. Civil Rules 54(d)(2), 58(c)(2), and Appellate Rule 4

In *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir.2004, 360 F.3d 604, 610, the court bewailed the complex interplay of the rules that integrate motions for attorney fees with the rules that govern appeal time. The Appellate Rules Committee asked the Civil Rules Committee to consider amendment of the Civil Rules "to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees [under Civil Rule 54(d)(2)] have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59." Few readers outside the Rules Committees are likely to be able to understand that suggestion without a trip to the rules books. The Civil Rules Committee has concluded that it is better to live with the complexity of the present rules than to run the risk of unintended consequences — and perhaps still greater complexity — by attempting to address the one identified gap in the present rules.

Summary explanation is difficult. The setting is clear enough. A decision that resolves all of the claims among all the parties is a final decision. Appeal time starts to run when it is set forth in a separate document under Rule 58 (or not later than 150 days after entry in the civil docket, notwithstanding failure to comply with the separate document requirement). A timely motion for attorney fees does not suspend appeal time. Without more, the result would be that the parties must proceed with any appeal on the merits before disposition of the fee motion. If the district court is able to dispose of the fee motion before the appeal is decided, it may be possible to consolidate separate appeals on the merits and on the fee issues. But there is a risk that two appeals must be considered where one would be better. Rule 58(c)(2) establishes a flexible procedure to address this risk. After a timely fee motion is filed, the district court, in the language of Style Rule 58(e), "may act before a notice of appeal has been filed and become effective to order that the Rule 54(d)(2)

motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." Translated, that means that the district court can order that appeal time is suspended until a notice of appeal has transferred jurisdiction of the appeal on the merits to the court of appeals.

Reading together four rules set out in two different sets of rules is not an easy task. The difficulty of the task is augmented by the complexity of the rules involved, particularly Appellate Rule 4(a). The complexities, however, have accumulated in responding to important needs. The time for post-judgment motions must be brief, and must be integrated with appeal times. Many combinations of filings are possible. The rules must address as many combinations as can be foreseen. Responses to the present problem that reduce complexity would come at a cost. The most likely simplifying solutions would be to rule that appeal time is never suspended by a timely fee motion, or that it is always suspended. Neither alternative seems attractive.

Apart from simplification, the present rule text could be read to support a nonsensical interpretation. Because the district court can act "before a notice of appeal has been filed and become effective," it could be argued that expiration of appeal time does not cut off the right to extend appeal time. Imagine judgment on Day 1. A timely fee motion on Day 10. No further action until an order granting or denying the fee motion on Day 150. An appeal can then be taken from the order on the fee motion. But what of the judgment on the merits? Appeal time has expired long since. But no notice of appeal on the merits has been filed or become effective. Can the district court then act to order that the fee motion suspends time to appeal on the merits? The possibility that this argument might succeed seems too low to justify an attempt to enter the thicket to find a correction that does not increase complexity or invite unintended consequences.

The Committee asked the Federal Judicial Center to undertake a study to determine whether this part of Rule 58 seems to be causing problems in practice. A summary appears in the draft Minutes for the May meeting. The conclusion is clear. There is no apparent reason to believe that the present rules are creating significant problems, or even that they are being much used.

The Committee will transmit this report to the Appellate Rules Committee. If the Appellate Rules Committee believes that further work is desirable, the Committee is willing to join in the project.

B. Discovery Projects

A subcommittee chaired by Judge David Campbell is studying the operation of Rules 26(a)(2)(B) and 30(b)(6).

Rule 30(b)(6) allows a litigant to name an organization as deponent. The notice must specify the subjects of inquiry. The organization must then designate people to testify for it, specifying the subjects on which each will testify. The designated witnesses must be educated to "testify as to matters known or reasonably available to the organization."

The Rule 30(b)(6) project has advanced further than the Rule 26(a)(2)(B) project. The study of Rule 30(b)(6) was first requested by the New York State Bar Association Committee on Federal Procedure. The subcommittee solicited advice from bar groups that had commented on the e-discovery amendments and received more than a dozen thoughtful replies. Study of the responses suggests that many of the dissatisfactions with Rule 30(b)(6) are similar to general dissatisfactions with discovery. Inquiring parties believe they are subjected to run-arounds and stonewalling. Responding parties believe they are being subjected to overreaching and poorly defined demands. Addressing these dissatisfactions by amending Rule 30(b)(6) is not likely to prove profitable. But other questions remain that deserve serious further study. One question is whether there is a need to protect against efforts to extract an organization's legal contentions from a deposition witness rather than by interrogatory or request to admit. A closely related question is whether the deposition testimony establishes a judicial admission, or whether the organization can contradict the testimony at trial, subject to the usual use of the deposition to impeach. Another closely related question goes to the protection of work product and privilege against questions as to the sources of information

relied upon by the witness to convey the "matters known or reasonably available to the organization." All of these questions may be affected by the question whether an organization should be obliged to supplement the deposition testimony under Rule 26(e), distinguishing an organization deposition from all other depositions save those of an expert trial witness. The duty to supplement, finally, might easily become an opportunity to defer answering at the deposition in reliance on an assertion that the information is not yet available but will be supplied by written supplementation later.

Rule 30(b)(6) responds to important needs. It can facilitate speedy and lower-cost discovery. This project will be approached with care.

The study of Rule 26(a)(2)(B) began with the provision that a party need not disclose a report of an employee who will be an expert trial witness unless the employee's duties as an employee regularly involve giving expert testimony. Many courts ignore the distinction between types of employees, requiring a disclosure report as to all employee expert trial witnesses. The subcommittee will explore the reasons that led to adopting the current rule and seek to decide whether the rule should be revised or somehow reinvigorated.

Broader questions have been directed to Rule 26(a)(2)(B) by the Litigation Section of the American Bar Association. The Section identified two major areas of concern. The first involves disclosure of information discussed between the attorney and the trial expert witness. The 1993 Committee Note that explained adoption of Rule 26(a)(2)(B) noted that the rule requires disclosure of data and other information considered by the expert. The Note went on: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." The Section directly challenges compelled disclosure of privileged and work-product information. In addition, the Committee notes that a party who can afford to devote great resources to litigation retains two sets of experts. One set, used to consult but not to present trial testimony, helps to prepare with full access to privileged and work-product information. The other set, used as trial witnesses, are prepared by means calculated to protect privileged and work-product information. This expense is a waste when all parties are able to afford it, and unfair when one party can afford it and others cannot.

The concern with disclosure is counterbalanced by the spirit that moved the Committees in developing the expert disclosure rule. Expert testimony is seen as a collaborative process between counsel and witness, yielding testimony that cannot be appraised effectively without knowing the extent of counsel's influence.

The Litigation Section's other concern focuses on discovery of draft expert reports. Discovery is said to have several undesirable effects. The efficiency of expert preparation is impeded when experts avoid discovery by simply refusing to prepare draft reports. Preparation is left to thought and unrecorded exchanges with counsel. The fairness of discovery may be undermined when some experts automatically destroy drafts before discovery, perhaps repeatedly scrubbing computer drives to ensure against forensic recapture.

The subcommittee will consider these questions. The 1993 innovations in disclosure were revised in part in 2000, and there should be enough experience with expert trial witness disclosure to justify examination of the way it has worked out in practice.

C. Summary Judgment and Notice Pleading

Since 1938 the Civil Rules have been framed by the structure of notice pleading, discovery, and summary judgment. The discussion above reflects the experience that discovery has continually occupied the Advisory Committee for some forty years. Summary judgment was studied in depth in the late 1980s, leading to a proposal that would have completely overhauled Rule 56. That proposal was rejected by the Judicial Conference in 1992. During these same years, lower courts began to develop "heightened pleading" requirements for particular types of litigation. The Supreme Court has responded by ruling that heightened pleading can be required only when provided by specific rule provisions, such as Rule 9(b), or by statute, such as the Private Securities Litigation Reform Act. Explicit requirements for heightened pleading have declined markedly in the wake of these Supreme Court decisions, but many observers believe that lower courts frequently manage to exact much greater detail under the rubric of "notice" pleading than might be guessed from the "Rule 8" Forms adopted to illustrate pleading requirements.

Rules 56 and the pleading rules are being studied together to determine whether new approaches might, when combined with wise management of discovery, advance pretrial disposition of actions that continue to impose unnecessary cost and delay. The study has been advanced by Administrative Office work with local rules on summary judgment and with recent pleading decisions.

Tentative directions are beginning to emerge, but they remain tentative. For pleading, several possible approaches are being subordinated for the time being. It would be possible — although highly controversial — to replace notice pleading with some form of "fact" pleading. Short of that, an effort might be made to reinvigorate the Rule 8 provision that the short and plain statement of a claim must show that the pleader is entitled to relief. Or particularized pleading requirements might be adopted for specific substantive claims. The difficulties to be encountered in developing any of these approaches have focused attention on a different approach. Rather than attempt wholesale revision of pleading standards, the more definite statement procedure of Rule 12(e) might be developed in ways that somewhat resemble the bill of particulars procedure abandoned in 1948. A more definite statement of claim or defense could be required on a case-by-case basis when more specific pleading may support disposition on the pleadings or focus discovery and facilitate more effective summary judgment procedures.

Summary judgment practice involves both the standards for deciding whether there is a genuine issue of material fact and the procedures for reaching that decision. Although many practitioners believe that the actual working of the summary judgment standard varies among the circuits, and even among different judges in a single district, it would be difficult to draft rule text that would achieve greater uniformity in practice. For that matter, it is difficult to imagine a standard that would depart usefully and validly from the standard for judgment as a matter of law in a jury trial. Rather than focus on the standard for summary judgment, the Committee will focus on summary judgment procedures. Some of the questions are small. The time periods provided in Rule 56 seem woefully short; they will be addressed as part of the Time Computation Project. Other questions are more important. As a conceptual matter, the most important questions may surround the proper response when an opposing party fails to respond at all to a motion for summary judgment or opposes in a manifestly inadequate way. Can the court grant the motion by default? Or should it examine the supporting materials offered by the movant to determine whether they establish the absence of a genuine issue? As a practical matter, the most important question may be whether Rule 56 should draw on a host of local rules to spell out requirements to identify specific issues said to be established beyond genuine dispute and to support the argument by citing to specific record sources. A variety of other issues will be explored as well.

D. Evidence Rule 502

At this meeting the Evidence Rules Committee is presenting a new Evidence Rule 502 for approval for publication. Rule 502 addresses some questions of waiving attorney-client privilege

and work-product protection. These questions have proved troubling in dealing with the civil discovery rules. Draft Rule 502 deals with many of the discovery problems, addressing particularly waiver through inadvertent production, enforcing party agreements that prevent waiver, and adopting party agreements by court order. It also adopts a standard for subject-matter waiver, a problem that many lawyers identify as a major source of cost and delay in responding to discovery. Several members of the Civil Rules Committee attended a conference on Rule 502 at the Fordham Law School and participated in the ensuing Evidence Rules Committee meeting. The Civil Rules Committee is grateful for this cooperative approach to developing an Evidence Rule that is so deeply entwined with discovery issues and looks forward to hard work with the Evidence Rules Committee as the draft is refined into a final proposal for enactment by Congress.

12-G

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MAY 22-23, 2006

The Civil Rules Advisory Committee met on May 22 and 23, 2006, at the Administrative Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Frank Cicero, Jr., Esq.; Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell; and Chilton Davis Varner, Esq., who attended by telephone. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Professors Thomas D. Rowe, Jr., and R. Joseph Kimble, and Joseph F. Spaniol, Jr., Esq., attended as consultants. Judge Sidney A. Fitzwater, Judge Thomas W. Thrash, Jr., and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office; Robert Deyling also attended, as did Kate Simon who staffs the Committee on Court Administration and Case Management. Thomas Willging, Emery G. Lee, and Rebecca Norwick represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Alfred W. Cortese, Jr., Esq., and Jeffrey Greenbaum (ABA Litigation Section liaison) attended as observers. Professor Daniel J. Capra attended by telephone for the discussion of Civil Rule 5.2 and a report on proposed Evidence Rule 502.

Judge Rosenthal opened the meeting by noting the expectation that the Committee's work on the Style Project will be brought to a conclusion. That result will bring enormous satisfaction. She also noted that the September meeting will be the final meeting for members Judge Russell, Justice Hecht, and Frank Cicero, and anticipated the expressions of gratitude that will be offered in September for their constant engagement in all aspects of the Committee's work during their years as members.

Judge Rosenthal also noted that after the Judicial Conference approved a package including the e-discovery amendments, Supplemental Rule G on civil forfeiture, new Rule 5.1., and amendments of Rule 50(b), the Supreme Court transmitted them to Congress. That package standing alone represents a remarkable feat of productivity.

Turning to a sad note, Judge Rosenthal observed that the passing of Judge Edward Becker had lost the Committee a true friend of the rules process. Judge Becker was known to all of us. He regarded himself as a "Philadelphia Lawyer." Two Philadelphia lawyers on the Committee, Judge Baylson and Robert Heim, offered their own tributes. Judge Baylson recounted meeting with Judge Becker not long before his death. They discussed the Committee's consideration of Rule 15, a subject long pursued by Judge Becker. Judge Becker remained actively engaged with the topic and was pleased that the Committee had appointed a subcommittee and would be taking up its recommendations this spring. Robert Heim noted that the Philadelphia news stories had described Judge Becker as one of the most influential appellate judges, known both for his learning and his modesty. Those words captured him well. He was a prodigious intellect. He would put questions at oral argument that the best lawyers had not anticipated — but would help the lawyer work toward an answer. He also had a great sense of humor — not only did he write a district-court opinion in verse, but it was good verse! He was a good, kind, man. We will be less without him.

John Rabiej reported that the agenda for the Judicial Conference meeting in March was relatively light. Judge Rosenthal added that Chief Justice Roberts presided to admirable effect.

October 2005 Minutes

The minutes of the October 2005 meeting were approved, subject to correction of technical errors identified by the Reporter.

46 *Rule 5.2*

47 Judge Rosenthal introduced discussion of Rule 5.2, the Civil Rules version of the "E-
48 Government Act" rule. She noted that it is important that the Bankruptcy, Civil, and Criminal Rules
49 be identical as far as possible. That means that no one Advisory Committee is as free as it might
50 wish to shape its rule entirely to its own liking. Rule 5.2(c), however, is unique to the Civil Rules
51 and can be developed outside this constraint. Apart from Rule 5.2(c), coordination must be
52 accomplished through the Standing Committee subcommittee constituted for this purpose, as assisted
53 by Professor Capra. The Reporters for the several Advisory Committees have exchanged a flurry
54 of e-mail messages; changes have been recommended even since the version of Rule 5.2 that appears
55 in the agenda book.

56 Judge Fitzwater, Chair of the Standing Committee E-Government Act Subcommittee, began
57 discussion by noting that the Subcommittee developed a template rule drafted by Professor Capra.
58 The Bankruptcy and Criminal Rules Committees have adopted revisions at their spring meetings.
59 The Civil Rules Committee now has its turn. The Reporters have worked hard to achieve
60 uniformity.

61 Professor Capra noted that achieving uniformity is a nettlesome task, but it is one required
62 by the E-Government Act as well as the ambition to avoid discrepancies between different sets of
63 Enabling Act rules that address the same subject. A lot of time has been devoted to discussing
64 choices between "the" or "a," between "and" or "or," and so on.

65 Looking to Civil Rule 5.2, Professor Capra noted that subdivisions (a) and (b) are common
66 among Bankruptcy, Civil, and Criminal Rules. Rule 5.2(c) is unique to the Civil Rules. It began
67 with the Committee on Court Administration and Case Management, which was persuaded that the
68 burden of redacting files in Social Security cases justified a different approach. The Department of
69 Justice has made the case that immigration cases deserve similar treatment for similar reasons.
70 Subdivision (d) is required by the E-Government Act. Subdivision (e) reflects the value of protective
71 orders. Subdivision (f) ties to an amendment of the E-Government Act adopted by Congress on
72 advice of the Department of Justice. Subdivision (g) also is drawn from the E-Government Act.
73 Subdivision (h), finally, is a provision on waiver adopted uniformly across the rules sets.

74 A list of changes from the agenda book version of Rule 5.2 recommended by the Reporters'
75 group were described. The Reporters agreed that each set of rules should adhere to its own internal
76 style conventions. The internal cross-reference in Rule 5.2(h), for example, will be to "Rule 5.2(a),"
77 not to "(a)," nor to "subdivision (a)."

78 A change in subdivision (b)(4) temporarily adopted in other rules but not shown in the
79 agenda book was abandoned by all, leaving the agenda book version current again: "the record of
80 a court or tribunal ~~whose decision becomes part of the record~~ * * *" is exempt from redaction. All
81 Reporters came to agree that the exemption should extend to any record filed in the present
82 proceeding without regard to whether the other court's "decision" in some sense "becomes part of
83 the record."

84 A style change in Rule 5.2(e)(2) described a court order limiting or prohibiting "<u>a nonparty's</u>
85 remote electronic access ~~by a nonparty~~ to a document filed with the court." This change conforms
86 to the style convention favoring use of the possessive whenever possible. Together with the
87 convention favoring drafting in the singular, the effect remains the same. The order can apply to all
88 nonparties. This revision is a good illustration of the need to accept uniformity among the rules, and
89 to defer to the Style Subcommittee.

90 The Committee Note observes that a party who has waived redaction by filing its own
91 information without redaction can seek relief from the waiver. The question whether the opportunity

92 for relief should be reflected in rule text was answered by noting that the rule is designed to support
93 a deliberate choice to avoid the cost of redaction, and to make clear that one party's waiver does not
94 defeat the right of others to insist on redaction.

95 Several comments addressed subdivision (c), which allows a nonparty full electronic access
96 to social-security and immigration files at the courthouse, but severely limits remote electronic
97 access by a nonparty. The comments suggested diverging concerns. One concern was that it is
98 important to allow convenient and full electronic access by public media and scholarly researchers,
99 particularly to court files bearing on the troubled practices in immigration matters. But an opposing
100 concern was that "data miners" will take advantage of electronic access at the courthouse to gather
101 vast amounts of personal information including identifiers, financial information, and health
102 information. Because subdivision (c) is unique to Civil Rule 5.2, it can be revised without need for
103 coordination with the other Advisory Committees. It would be possible to meet these comments by
104 revising the provisions for social-security and immigration cases. Nonparties could be barred from
105 electronic access to the administrative record, whether remotely or at the courthouse. That would
106 make it possible to avoid the great burden of redacting the administrative record. At the same time,
107 the legitimate needs of public media and academic researchers could be satisfied by a court order
108 permitting access.

109 The Department of Justice initially requested that immigration cases be added to subdivision
110 (c) because of the great burden of redacting the administrative file and because of the risk that
111 mistakes still would be made. The burden of redacting papers prepared for purposes of court review
112 would not be as great. On the other hand, it is late in the day to consider revisions. As to social-
113 security cases, the published proposal reflected recommendations of the Committee on Court
114 Administration and Case Management that have been adopted as Judicial Conference policy. Some
115 knowledgeable comments suggest that the risk presented by "data miners" is real, but clear
116 information is hard to come by. On the other hand, the bankruptcy courts have had experience with
117 data miners for many years. Traditionally it has been accomplished by sending people to the
118 courthouse to physically comb through records. But surely it will become a matter of electronic
119 searching as courts complete the transition to electronic filing. For the moment the cost of access is
120 ten cents a page, a formidable barrier. But that may change. Just what the consequences will be,
121 however, is not so clear. And it is important to remember the fundamental starting point established
122 by Judicial Conference policy: absent good reason, public access to electronic court records should
123 be as complete as access to paper court records. This is the "practical obscurity" issue — so long
124 as access required physical presence at the courthouse and individual reading of paper files, most
125 sensitive information was protected by the barriers to access. "Only the most determined or the most
126 academic" will undertake the effort. Electronic access may change the balance, but it is difficult to
127 predict when or how.

128 It was observed that the case-management software now being adopted will enable court
129 clerks to manage the three levels of access provided by Rule 5.2 — full remote electronic access by
130 a party or a party's attorney; full electronic access for anyone at the courthouse; and limited remote
131 electronic access by nonparties.

132 And it was agreed that the limits on remote electronic access by a nonparty will not limit a
133 judge's authority to use electronic court files from home or an office away from the courthouse
134 housing the relevant computer file.

135 The Committee approved a motion to recommend adoption of Rule 5.2 to the Standing
136 Committee, noting again the remarkable level of work required to achieve consistency across the sets
137 of rules.

138 *Evidence Rule 502*

139 Judge Rosenthal noted that several Advisory Committee members attended the Evidence
140 Rules Committee's conference and meeting to consider proposed Evidence Rule 502 and expressed
141 appreciation to Judge Smith and Professor Capra, Chair and Reporter of the Evidence Rules
142 Committee, for the opportunity. This Committee has been frustrated in its attempts to deal with
143 waiver of attorney-client privilege and work-product protection by inadvertent production in
144 discovery. The perils of inadvertent production have increased with the rapid growth of discovering
145 electronically stored information. Efforts to avoid inadvertent production — and to avoid the risk
146 of waiving privilege as to all communications touching the subject-matter of an inadvertently
147 produced communication — add to cost and delay in discovery. The discovery problems, however,
148 intersect with larger problems that lie in the Evidence Rules Committee's province. A rule that
149 modifies an evidentiary privilege, moreover, can take effect only if approved by an Act of Congress.
150 The Evidence Committee's work is welcome, and the invitation to participate in its work is also
151 welcome.

152 Judge Baylson observed that the current draft Rule 502 reflects substantial revisions from the
153 draft that initiated the Evidence Rules Committee's work. It addresses topics beyond the discovery
154 problems, including adoption of a "selective waiver" approach to disclosure to government agencies
155 while cooperating in an investigation.

156 Professor Capra began his description of Rule 502 by observing that it does not establish
157 rules on waiver. Instead, it addresses a few acts that do not waive attorney-client privilege or work-
158 product protection. Although the goal is to perfect a draft that can be submitted to Congress for
159 enactment by Act of Congress, the present proposal is to recommend publication of the rule for
160 public comment in the regular Enabling Act process. The rule is in "a very initial stage."

161 Subdivision (a) addresses the scope of a waiver by limiting "subject-matter" waiver to
162 communications or information that "ought in fairness to be considered with the disclosed
163 communication or information." This "fairness" test is adapted from Evidence Rule 106.

164 Subdivision (b) is the central provision governing inadvertent disclosure in federal litigation
165 or federal administrative proceedings. It provides that the disclosure does not effect a waiver if the
166 holder of the privilege or work product took reasonable precautions to prevent disclosure and took
167 reasonably prompt measures to rectify the error after the holder knew or should have known of the
168 disclosure. The procedures of proposed Civil Rule 26(b)(5)(B) are incorporated.

169 Subdivisions (d) and (e) expand the provisions for discovery. Subdivision (e) recognizes the
170 binding effect of an agreement on the effect of disclosure, but limits the effect to the parties to the
171 agreement. Subdivision (d) makes an agreement binding on all persons or entities if it is
172 incorporated in a federal court order governing disclosure in connection with litigation pending
173 before the court.

174 Subdivision (c) governs selective waiver, permitting disclosure to a federal agency exercising
175 regulatory, investigative, or enforcement authority without waiving privilege or work-product
176 protection. This provision will be controversial. The proposal is to publish it in brackets to indicate
177 recognition of its controversial character.

178 Judge Rosenthal noted that an American Bar Association task force has considered earlier
179 drafts. Individual members of the task force have raised the question whether the selective waiver
180 provisions will prove counterproductive. Their concern is that government agencies have become
181 too insistent on extracting waivers as a condition of favorable treatment for cooperating in an
182 investigation. Adopting selective waiver might increase the frequency of waiver demands and
183 increase the pressure to succumb.

184 Judge Rosenthal noted another interaction with the pending e-discovery amendments. There
185 was concern that the provisions addressing privileged and work-product material might be read to
186 promise greater protection than in fact can be delivered through the Civil Rules. Evidence Rule 502
187 would bolster the protection.

188 It was noted that Gregory Joseph continues to press the question whether a single waiver rule
189 should differentiate between waiver of work-product and waiver of privilege.

190 Finally, it was observed that there is a relation between this topic and Rule 26(a)(2)(B). The
191 American Bar Association Litigation Section is considering the questions that arise from sharing
192 privileged and work-product materials with expert trial witnesses. Disclosure and discovery rules
193 can be adapted to answer this question in part, although the waiver question will arise at trial as well.

194 *Style Project*

195 Judge Rosenthal introduced the Style Project materials by noting the amount of work that has
196 been done. Something like 750 documents have been generated. Many of them are long. The work
197 has been done so well that in five years no one will remember that there was a Style Project — the
198 restyled rules will come to seem original and inevitable. But some work remains to be done at this
199 meeting. Many of the footnotes in the agenda draft identify choices that probably do not need further
200 discussion. But all of the footnotes, and indeed all of the Style Rules, remain open for discussion.
201 Any issues that require further drafting that cannot be accomplished "on the floor" will be resolved
202 by circulating final texts for approval after the meeting.

203 Rule 1: Present Rule 1 says that these rules govern "all suits of a civil nature." Style Rule 1 changed
204 this to "all civil actions and proceedings." Comments expressed concern that "and proceedings" may
205 expand the domain governed by the rules, a substantive change. The Standing Committee Style
206 Subcommittee [SCSSC] recommended deletion of "and proceedings," and Subcommittee A agreed.
207 But further consideration suggests that "and proceedings" should be retained. Rule 3 says that a
208 "civil action" is commenced by filing a complaint. There is a risk that Rule 3 might be read as a
209 definition, foreclosing application of the rules to events that are not initiated by filing a complaint.
210 One illustration is a Rule 27 petition to perpetuate testimony — it is clear that the Civil Rules must
211 govern this proceeding, but the problem is clear. The Second Circuit has ruled that confirmation of
212 an arbitration award under legislation implementing the New York Convention need not be by
213 formal complaint, even though Rule 81(a)(6) provides that the rules govern "proceedings under" 9
214 U.S.C. Apart from that, "proceedings" is a word used both in the Civil Rules and in other sets of
215 rules. Civil Rule 26(a)(1)(E) refers to some of the things excluded from initial disclosure obligations
216 as "proceedings." Rule 60(b) refers to a motion to relief from a "proceeding." Evidence Rule
217 1101(b) applies the Evidence Rules to "civil actions and proceedings."

218 Discussion began by noting that this is a question of substance, not mere style. Some support
219 was expressed for returning to the present rule's "suits of a civil nature" as the only way to avoid
220 unintended changes. One member who did not like "suits of a civil nature" suggested that the rule
221 might be limited to "civil actions," leaving the complications to be addressed in the Committee Note.
222 That suggestion was met by renewal of the observation that Committee Note statements must be
223 supported by rule text. Further discussion expressed uncertainty whether any example could be
224 found of circumstances in which "proceedings" would bring into the Civil Rules something they do
225 not govern now.

226 The conclusion was that Rule 1 should go forward as published, retaining "and proceedings"
227 and "and proceeding." The paragraph of the Committee Note referring to summary statutory
228 proceedings was revised by expanding it to say: "This change does not affect ~~the~~ such questions as
229 whether the Civil Rules apply to summary proceedings created by statute. * * *"

230 Rule 4: Two changes were made in Rule 4(d)(1)(D): "using text prescribed in ~~Official~~ Form 5 ~~1A~~
231 * * *." Former Form 1A is restyled as Form 5. The forms are not described as "official" in Rule 84.
232 Although Rule 4(d) directs that Form 5 be used to inform the defendant of the consequences of
233 waiving and not waiving service, there is no need to describe it as "official" for this purpose.

234 Rule 5.1(a)(1)(A): Rule 5.1, which is before Congress on track to take effect on December 1, 2006,
235 was not published in the Style Rules package. In the course of revising it to conform to style
236 conventions, a word was inadvertently intruded. The Committee agreed that it must be deleted: "the
237 parties do not include the United States, one of its agencies, or one of its officers or employees ~~sued~~
238 in an official capacity." During the development of Rule 5.1 it was early recognized that there is no
239 reason to require notice to the United States when the United States or one of its agents is a plaintiff.

240 Styling Rule 5.1 changed references to certification of "a constitutional challenge" to
241 certification that a statute "has been questioned." This change was approved. It draws from the
242 language of 28 U.S.C. § 2403 and reflects the use of "question" elsewhere in Rule 5.1.

243 Rule 9(a)(2): Present Rule 9(a) directs that a party who raises an issue about another party's capacity
244 or authority to sue or legal existence "do so by specific negative averment." The Style Rule says "do
245 so by specific denial." "Specific denial" was approved. It may seem awkward since Rule 9(a)(1)
246 carries forward the rule that a party need not allege its capacity, authority, or legal existence — there
247 is no allegation to deny. But the Style Rule continues to provide that the denial must state any
248 supporting facts peculiarly within the pleader's knowledge. If the pleader knows none, it cannot
249 plead with any greater "particularity" than a denial (which may rest on a lack of information or
250 belief).

251 Rule 10: Two changes were made in the caption of Rule 10(c): "Adoption by Reference; ~~Attached~~
252 Exhibits."

253 Rule 12: The Bankruptcy Rules Committee suggested that the Committee Note should be expanded
254 to describe the rearrangement of material among the subdivisions: "Some subdivisions have been
255 redesignated. Former subdivision 12(c) has been divided into new 12(c) and (d), while former
256 subdivision (d) has become new 12(i)." The purpose is to assist future researchers, particularly those
257 who rely on electronic searches. An electronic search for cases discussing Rule 12(i), for example,
258 would stop short at December 1, 2007. To be sure, the chart of changes published as Appendix B
259 to the Style Rules, pages 220-221 of the publication book, will be carried forward with the Style
260 Rules, but researchers may not routinely consult that chart, particularly after the Style Rules have
261 been in effect for a time.

262 This suggestion was framed as a general issue, to be implemented by adding each item in the
263 Appendix B chart to the relevant Committee Note. Judge Thrash stated that the SCSSC would rather
264 not add to the length of the Committee Notes in this way. Further discussion agreed that expanded
265 Committee Notes might be useful during the period of transition to the Style Rules, but expressed
266 hope that all of the major rules publications would include the Appendix B chart as a research aid.
267 Some publications likely will also provide this information in annotations to each specific rule. The
268 Committee agreed that Committee Note language should not be added.

269 Rule 16: Rule 16(c)(1) carries forward a phrase from the present rule: "*If appropriate*, the court may
270 require that a party or its representative be present or reasonably available by telephone to consider
271 possible settlement." (Style-Substance Rule 16(c) changes this to being reasonably available by
272 "other means.") "If appropriate" is an "intensifier." Retaining it violates the drafting guidelines —
273 a court should not be admonished to avoid doing something inappropriate. The phrase was carried
274 forward because of the sensitivities that attend court directions to discuss settlement — a party may
275 legitimately take the position that it will not settle on terms that compromise its position in any way.
276 It also reflects a pragmatic concern. The Department of Justice, for example, has clear rules on who

277 has authority to settle; large settlements require approval by a person in a high position facing many
278 competing demands. "If appropriate" has been useful in persuading reluctant judges that it is not
279 appropriate to require that a high official be committed to immediate availability, and that it suffices
280 to have participation by a person who can contribute usefully to the discussion. The Committee
281 agreed that it would not be desirable to remove the words from the rule text only to restore them by
282 an admonition in the Committee Note. Concern was expressed that if the words actually do have
283 an effect, deletion would change meaning. But it was noted that "if appropriate" does not directly
284 provide much restraint, and that these words are relatively new in the rule. A motion to delete the
285 words failed, 3 yes and 6 no.

286 Rule 16(e) as published read: "The court may modify an order *issued after a final pretrial*
287 *conference* only to prevent manifest injustice." Comments observed that this formula seems to apply
288 to any order issued after that time. One example would be a Rule 51 order to submit proposed jury
289 instructions ten days before trial. A revision was suggested: "an order reciting the action taken at
290 the conference * * *." But Subcommittee A concluded that this revision is vulnerable to the risk that
291 actions may be taken at a final pretrial conference that are not expressly recited in the order. One
292 illustration of particular concern has been approval of a Rule 36 admission — the "manifest
293 injustice" standard should apply to later withdrawal or amendment if the admission was adopted at
294 the final pretrial conference, but the order might not recite this action. The Committee approved this
295 final revision: "The court may modify ~~an~~ the order issued after a final pretrial conference only to
296 prevent manifest injustice."

297 Rule 23: Professor Kimble proposed a revision of Rule 23(e) to avoid repeated references to
298 "settlement, voluntary dismissal, or compromise." As compared to other parts of Rule 23, the
299 language of this subdivision is new and has not acquired a large body of interpretive decisions. The
300 revision clearly says the same things in fewer words. The Committee approved a revised Rule 23(e):

301 **(e) Settlement, Voluntary Dismissal, or Compromise.** * * * The following procedures apply to a
302 proposed settlement, voluntary dismissal, or compromise:

303 **(1)** The court must direct notice in a reasonable manner to all class members who
304 would be bound by the proposal~~ed settlement, voluntary dismissal, or~~
305 ~~compromise~~.

306 **(2)** If the proposal would bind class members, ~~T~~the court may approve it ~~a~~
307 ~~settlement, voluntary dismissal, or compromise that would bind class~~
308 ~~members~~ only after a hearing and on finding that it is fair, reasonable, and
309 adequate.

310 **(3)** The parties seeking approval must file a statement identifying any agreement
311 made in connection with the proposal~~ed settlement, voluntary dismissal, or~~
312 ~~compromise~~.

313 **(4)** [unchanged]

314 **(5)** Any class member may object to the proposal if it ~~a proposed settlement,~~
315 ~~voluntary dismissal, or compromise that~~ requires court approval under this
316 subdivision (e) * * *."

317 It was noted that although paragraph (4) refers only to refusal to approve a settlement, this
318 provision for a second opt-out opportunity stands within itself and need not be revised to reflect
319 editing of "voluntary dismissal or compromise."

320 Rule 25: Present Rule 25(a)(1) says that unless a motion to substitute is made within 90 days after
321 death is suggested on the record, "the action *shall* be dismissed as to the deceased party." The

322 published Style Rule — shaped after lengthy discussion — said the action "may" be dismissed."
323 This decision drew from the provisions of Rule 6(b), which allow the court to extend the time to
324 move for substitution even after the 90-day period has expired. To say that the court "must" dismiss
325 obscures the alternative power to allow substitution and refuse to dismiss. Rule 6(b), on the other
326 hand, remains. It clearly qualifies "must," so long as anyone thinks to read it. And there are
327 situations in which the court must dismiss — there is no one carrying on the litigation with respect
328 to the dead party, and no one seeking an extension of time to substitute a successor or representative.
329 Some Committee members suggested that in any event, "shall" in the present rule means "must." Of
330 course there are situations in which the court should not dismiss — one would involve a contest for
331 appointment as representative that cannot be resolved within 90 days after service of the statement
332 noting death. At a minimum, the final sentence in the proposed Committee Note explaining the
333 change to "may" should be deleted — in such a situation there is no negligence, not excusable
334 negligence.

335 Turning to the Committee Note, it was agreed that there is no need for Committee Note
336 explanation when a Style Rule substitutes "must" for "shall" in a present rule. That is the routine act.
337 Explanation may be appropriate when "shall" is changed to "may" or "should."

338 A motion to substitute "must" for "may," and to delete the proposed Committee Note
339 paragraph that would explain the use of "may," was approved over two dissents.

340 Rule 26: Rule 26(a)(1)(C) presented the occasion to discuss a global issue. "Agree," "consent," and
341 "stipulate" appear throughout the rules. They may be characterized as "written" or "in writing," or
342 they may be used without a reference to writing. The global resolution has been to prefer "stipulate"
343 and "stipulation" as a general matter, but to use other words if the context makes that appropriate.
344 "Agreement" is used, for example, in Rule 23(e)(3) to refer to the side agreements that at times may
345 accompany a class-action settlement; Rule 35(b)(6) refers to an agreement for a physical or mental
346 examination without court order. In these places "stipulate" would not be appropriate. The
347 Committee agreed that there is no need to reconsider the many places in which references to writing
348 have been omitted. Almost all agreements are reduced to writing, at least in electronic form. Careful
349 practitioners invariably dispatch a confirming memorandum.

350 Rule 26(e) was discussed extensively in drafting the Style version. The present rule creates
351 a duty to supplement or correct a disclosure or discovery response "to include information thereafter
352 acquired" if a party "learns" that the disclosure or response is incomplete or incorrect. All reference
353 to "thereafter acquired" was deleted from the Style Rule because this limit was thought to have
354 disappeared from actual practice. All lawyers understand that there is an obligation to supplement
355 or correct a disclosure or response no matter whether the omitted information was known at the time
356 of the initial disclosure or response or whether in some sense the party "learned" of information
357 "later acquired." Subcommittee B recommended that this issue be considered further, noting that
358 the Rule could read: "must supplement or correct its disclosure or response to include later-acquired
359 information. The party must do so: * * *." The first question was whether the reference to later-
360 acquired information is needed to avoid an implication that it is proper to dole out disclosures and
361 discovery responses in bits and pieces — a party can argue that it has not violated Rule 26(g) by
362 deliberately revealing its information later rather than in timely fashion. The history of Rule 26(e)
363 was explored. The 1970 version presented many puzzles. For example, it contemplated that a
364 response could be both complete and incorrect when made. If a response was both complete and
365 correct when made, on the other hand, supplementation was required only if failure to supplement
366 amounted to knowing concealment. Later amendments were designed to clarify and strengthen the
367 duty to supplement. Throughout the period from the inception of Rule 26(e) in 1970, however, it
368 has been understood that it does not justify a deliberate tactic of making and later supplementing
369 incomplete responses. On the other hand, it was noted that there is confusion in practice. Lawyers

370 expect that adversary counsel will respond forthrightly with the information available at the time of
371 responding. But there is uncertainty as to what will happen with information later acquired. It is
372 standard practice to serve a request to supplement. That practice is likely to continue, although
373 perhaps somewhat limited by the Rule 33 limit on the number of interrogatories, no matter what Rule
374 26(e) says. A motion to add the "later-acquired information" language failed for want of a second.
375 Because this issue is explicitly discussed in the Committee Note, and because the Committee's
376 decision is so clear, the matter may be allowed to rest as it is.

377 Rule 34: Professor Kimble suggested that the drafting of later rules could be improved by adopting
378 a definition of "inspection" in Rule 34(a): "In these Rules, an inspection of documents, tangible
379 things, or land includes the right to copy, test, sample, measure, survey, or photograph." This
380 definition could be incorporated in other rules — particularly Rule 45 — to reduce the ambiguities
381 that arise from the various ways in which "inspect" and "produce" are (or are not) amplified. Rule
382 26(a)(1)(A)(iii), for example, refers to "inspection and copying as under Rule 34." Although the
383 rules do not have a general definitions rule, definitions are scattered throughout. Rule 54(a), for
384 example, defines "judgment." Rule 81(d)(1) and (2) define "state law" and "state." It might be
385 possible as an alternative to define "inspect" in Rule 45 alone, but that might create some implied
386 confusion in Rule 34. One reason for considering the question now is that "test and sample" were
387 added for documents only as part of the e-discovery amendments process. But the new emphasis
388 might be obscured if it were rolled back into a single common definition only one year after it takes
389 effect. The SCSSC thought it too late to adopt a definition without adequate time to ensure against
390 unintended consequences. And Subcommittee A worried about the possible consequences in
391 discovery of electronically stored information. The definition was put aside.

392 Rule 37: Style Rule 37(c)(1) carried forward a confusion in the present rule. "Disclose" is used
393 initially in the technical sense of Rule 26(a) disclosure, while it is used later in a more general sense
394 to refer to revealing information through disclosure or discovery. An interim proposal was to write
395 the rule to forbid use of "unrevealed information." Subcommittee A recommended a further
396 revision. Discussion led to these changes:

397 **(c) Failure to Disclose, to ~~Amend~~ Supplement an Earlier Response, or to Admit.**

398 **(1) Failure to Disclose or ~~Amend~~ Supplement.** If a party fails to ~~disclose the~~ provide
399 information or identify a witness as required by Rule 26(a) or (e), ~~— or to provide~~
400 ~~the additional or corrective information required by Rule 26(e) —~~ the party is not
401 allowed to use ~~as~~ that information or witness to supply evidence on a motion, at a
402 hearing, or at a trial ~~any witness or information not so disclosed~~, unless the failure
403 was substantially justified or is harmless. * * *.

404 Rule 39: Present Rule 39(a) provides that after a demand for jury trial the parties can consent to
405 nonjury trial by filing a written stipulation "or by an oral stipulation made *in open court* and entered
406 in the record." Style Rule 39(a) omits the reference to "in open court." The SCSSC prefers the Rule
407 as published, but was uncertain whether it changes the Rule's meaning. A Committee member
408 suggested that the open-court requirement may be intended to protect a client who wants a jury trial
409 against hidden surrender of the jury-trial demand by the lawyer. But the Rule generates confusion.
410 A pretrial conference would be a likely occasion to agree to withdraw a jury demand, and the
411 agreement could be put on the record. But is the conference "in open court"? Professor Rowe, who
412 researched this issue for the Subcommittee, observed that the cases recognize consent in at least two
413 sets of circumstances that are not "in open court." One is an agreement to withdraw made at a
414 pretrial conference. The other is waiver by conduct, notably proceeding to a bench trial without
415 objection. These decisions seem to be sensible. If "in open court" is added back to Style Rule 39(a),
416 it will continue to be ignored as it has been when there is good reason to ignore it. The Committee
417 concluded that Rule 39(a) should remain as published, without "in open court."

418 Rule 44.1: Present Rule 44.1 is a good example of the "intensifier" problem. It requires a party who
419 intends to raise an issue of foreign law to "give notice by pleadings or other *reasonable* written
420 notice." Style Rule 44.1 deletes "reasonable," in keeping with the convention that a rule need not
421 negate the implication that "unreasonable" notice suffices. If Rule 44.1 requires "reasonable" notice,
422 other rules that require only "notice" might seem to authorize notice without regard to
423 reasonableness. Comments and continuing discussion, however, focused on the 1966 Committee
424 Note written on adopting Rule 44.1 and on the practical needs it reflected. The Note reflects concern
425 that notice must be reasonable. The time of notice is important. The need for ample notice of an
426 intent to raise an issue of foreign law may be less now than in 1966, although some foreign-law
427 sources are not readily available for on-line research. On-line access varies greatly from one country
428 to another. And the need for time to find an expert witness remains. There is some question as well
429 whether a foreign-law expert witness need be disclosed under Rule 26(a)(2); reasonable advance
430 notice is important. Taking "reasonable" out of the rule, moreover, may send a message — some
431 people reading in earlier opinions will compare the former text without searching out the
432 disappearance of "reasonable" in the style process.

433 Further concern was expressed that simply removing "reasonable" without explanation would
434 be confusing. Work with the restyled Criminal Rules has caused difficulty to one member who has
435 found it difficult to heed the purpose to make no change in meaning when the words seem to change
436 meaning. It was suggested that this difficulty might be ameliorated by adding a specific explanation
437 to the Committee Note. But it was responded that each Committee Note reminds that the general
438 restyling does not change meaning, and that any attempt to explain all of the decisions to delete
439 intensifiers would be both incomplete and cumbersome. At the same time, thought should be given
440 to finding a general way to carry advice on this drafting convention, and a few others, with the new
441 rules. A general memorandum might be attached. Or it might be more effective to condense the
442 general memorandum into an expanded Committee Note to Rule 1.

443 A motion was made to revise Rule 44.1 to read: "must ~~give notice by a pleading or other~~
444 plead it or give other reasonable notice in writing." The motion failed, 4 yes to 5 no. But it was
445 agreed that an attempt should be made to summarize some of the style conventions, including the
446 deletion of intensifiers, in the Committee Note to Rule 1.

447 Rule 45: This change was approved for Rule 45(c)(2)(B)(ii): "inspection and copying may be ~~done~~
448 required only as directed in the order * * *." A comment suggested that "done" implies that the
449 parties cannot agree to resolve an objection without a confirming court order. Although this
450 implication seems strained, the change avoids any risk.

451 A long-festering question was renewed in comparing Style Rule 45(c)(2)(B)(ii) with
452 45(c)(3)(B)(iii). As published, each carried forward the words of the present rule. (2)(B)(ii) directs
453 the court to protect a nonparty from "significant" expense resulting from compliance with a
454 discovery subpoena to produce documents or tangible things or to permit inspection. (3)(B)(iii)
455 directs the court to protect a nonparty against "substantial" expense to travel more than 100 miles
456 to attend trial. Some participants expressed confusion as to which is greater — "significant" expense
457 or "substantial" expense. A small sum may be significant to a person in straitened circumstances;
458 a large sum may be insignificant to a wealthy person. Another view was that "substantial" refers to
459 a larger sum than "significant," and thus affords less protection. On this view, it was argued that
460 greater protection is required at the discovery stage because of long experience demonstrating the
461 huge burdens that discovery can impose and because a nonparty is not fairly subjected to the costs
462 of participating in discovery in litigation among others. The trial itself, however, is more important,
463 and it is fair to require greater sacrifices of nonparties who are called for the central duty of
464 appearing as witnesses. Although the SCSSC adhered to the view expressed by many that there is
465 no apparent reason to use different words in these two provisions, the Committee concluded that in

466 the midst of such confusion it is better to carry forward the language of the present rule. The Style
467 Rule will remain as published.

468 Rule 48: As published, Style Rule 48 said: "A jury must have no fewer than 6 and no more than 12
469 members." A comment suggested that this formulation might be read with the second sentence to
470 authorize a stipulation to begin with fewer than 6 jurors. The Committee agreed to revise Rule 48
471 to read: "A jury must initially have at least ~~no fewer than~~ 6 and no more than 12 members * * *."

472 Rule 50: Amendments to Rule 50(b) now pending in Congress and to take effect December 1, 2006,
473 were not reflected in the published Style Rules. The amended rule is designed to discard the former
474 practice that allowed a renewed motion for judgment as a matter of law — formerly called judgment
475 notwithstanding the verdict — only if a motion for judgment as a matter of law — formerly called
476 a directed verdict — was made at the close of all the evidence. In place of this requirement the new
477 rule allows renewal of any motion for judgment as a matter of law made "under Rule 50(a)." Despite
478 the style convention that prefers to avoid cross-references within a single rule by formal designation
479 — as "under Rule 50(a)" — this approach was adopted after careful consideration of alternatives.
480 The suggestion that Rule 50(b) could allow renewal of "a motion for judgment as a matter of law"
481 was rejected in drafting the revised rule. One problem is that this formulation might obscure the rule
482 that a renewed motion may rely only on the law and facts specified in the pre-submission motion.
483 Another problem is that Rule 56, both in its present form and in its style form, bases summary
484 judgment on showing that the moving party is entitled to judgment as a matter of law. It was
485 deliberately decided not to allow a post-submission motion to be supported by a pretrial motion for
486 summary judgment. The Committee agreed that Rule 50(b) should continue to refer to a motion
487 "made under Rule 50(a)."

488 At Professor Kimble's suggestion, a revision of punctuation was made: "No later than 10
489 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict,
490 no later than 10 days after the jury was discharged — the movant may file a renewed motion * * *."

491 Rule 63: Present Rule 63 begins: "If a trial or hearing has been commenced and the judge is unable
492 to proceed," another judge may proceed. Style Rule 63 began: "If the judge who commenced a
493 hearing or trial is unable to proceed * * *." A comment pointed out that this version narrowed the
494 present rule. There may be a succession of successors — the judge who commenced a hearing may
495 be succeeded by another judge, who later becomes unable to proceed and must be succeeded by yet
496 another judge. A tentative response revised the rule to read: "If the judge who ~~commenced~~
497 conducted a hearing or trial * * *." But this too was defective because it seemed to apply only if the
498 hearing or trial was concluded, losing sight of the present rule's application to mid-hearing disability.
499 Recognizing that it is important to be open-ended about the point at which a judge becomes unable
500 to proceed, it was agreed that the rule should begin: "If ~~the~~ a judge ~~who commenced~~ conducting a
501 hearing or trial is unable to proceed, any other judge may proceed ~~with it~~ upon certifying familiarity
502 with the record * * *."

503 Rule 64: Style Rule 64 provided for use of state pretrial security measures "to satisfy the potential
504 judgment." The Bankruptcy Rules Committee pointed out that this rule is forward-looking.
505 Provisional remedies are used not to satisfy a judgment, but to protect the ability to enforce a
506 judgment if an enforceable judgment is entered. The Committee approved their suggested revision:
507 "provides for seizing a person or property to ~~satisfy~~ secure satisfaction of the potential judgment."

508 Rule 65: Present Rule 65 includes a "classic syntactic ambiguity." Rule 65(d) says that an injunction
509 "is binding only upon the parties to the action, their officers, agents, servants, employees, and
510 attorneys, and upon those persons in active concert or participation with them who receive actual
511 notice of the order by personal service or otherwise." Absent a comma between "with them" and
512 "who receive actual notice," the rule could be read to say that an injunction binds a party and its

513 employees, etc., whether or not the party or its employees have actual notice. On this reading, actual
514 notice is required only as to persons in active concert with a party or (depending on resolution of
515 another ambiguity) in active concert with a party's employees. This ambiguity was resolved in the
516 Style Rule by clearly limiting the notice requirement to "other persons * * * who are in active concert
517 with" a party or its employees, etc. Further research by Professor Rowe, however, disclosed that
518 Rule 65(d) was intended to carry forward the provisions in former 28 U.S.C. § 363. Section 363
519 included the comma missing from Rule 65(d); it clearly applied the "actual notice" requirement to
520 parties and their employees. In most circumstances, moreover, it is appropriate to bind a party only
521 after actual notice of the injunction.

522 This revision was proposed:

523 **(2) Persons Bound.** The order binds only the following who receive actual notice
524 of it by personal service or otherwise:

525 **(A)** the parties;

526 **(B)** the parties' officers, agents, servants, employees, and attorneys; and

527 **(C)** other persons ~~who receive actual notice of the order by personal service~~
528 ~~or otherwise and~~ who are in active concert or participation with
529 anyone described in Rule 65(d)(2)(A) or (B).

530 Discussion took many paths. Draft Committee Note language to explain this provision raised
531 the question whether the Note should say that "ordinarily" a party is bound only with actual notice.
532 This question addresses the rarified possibility that in some situations it may be appropriate to invoke
533 a doctrine of "anticipatory contempt," binding a party who anticipates entry of an injunction and acts
534 deliberately to prevent effective relief. An example would be cutting down an ancient tree while the
535 court is considering whether to enjoin the cutting. It was agreed that the Note should not venture
536 into this territory.

537 Further discussion explored the expectations of practicing lawyers. If you serve a party's
538 attorney, that is thought to be notice to the party. And if a party is served, why should its employees
539 not be bound? It was responded that the party is bound, and is subject to contempt if it does not
540 comply. Disobedience by a party's employees is attributed to the party; the party has every interest
541 in seeing to it that its employees are notified of the obligation to comply with the order. Temporary
542 restraining orders are particularly likely to be submitted to the court with instructions that inform the
543 party restrained about its obligations to get notice to its employees. But an employee who acts
544 without actual notice should not be personally subject to contempt. So the party who wins an
545 injunction may find it in its own interest to see to it that employees are notified — to tell the
546 employee with the chain saw that the tree must not be cut down. Of course in many circumstances
547 it will be necessary to rely on the employer because the party who won the order "does not know
548 where to go" to notify employees.

549 The change was approved. The draft Committee Note language to explain the change was
550 deleted. (Restoration of the Note, with slight modifications to remove any implications addressed
551 to anticipatory contempt, was approved by post-meeting vote.)

552 Rule 69: Present Rule 69 directs that the procedure on execution "shall be in accordance with" state
553 practice. Style Rule 69 said the procedure "must follow" state procedure. A comment expressed
554 concern that "must follow" would bind federal courts too closely to state practice, creating a risk that
555 inadequate state procedure might defeat effective enforcement of a federal judgment. The
556 Committee approved Subcommittee A's recommendation to change to words closer to the present
557 rule: "must ~~follow~~ accord with the procedure of the state * * *."

558 Rule 71.1: Present Rule 71A(b) allows joinder of separate pieces of property as defendants in a
559 single condemnation proceeding "whether in the same or different ownership." Style Rule 71.1(b)
560 said "no matter who owns them." A comment expressed concern that these words might be read to
561 defeat immunities that depend on ownership, such as those that protect government property from
562 condemnation by another government. The concern seems strained. The rule only addresses joinder
563 procedure. Nonetheless the Committee determined to change the language to read: "no matter ~~who~~
564 ~~owns them~~ whether they are owned by the same persons or ~~whether they are~~ sought for the same
565 use," subject to final SCSSC review for style.

566 Late comments renewed a question that was not again reviewed by a subcommittee. Present
567 Rule 71A(e) states that "the defendant may serve a notice of appearance designating the property in
568 which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all
569 proceedings affecting *it*." "it" is patently ambiguous. If properly used in the original drafting, it
570 could refer only to the defendant as the only antecedent within the sentence. But "it" could easily
571 be read to refer to the property. This reading might be bolstered by the in rem nature of a
572 condemnation proceeding. And as a practical matter, the government finds it easier to make an
573 objective judgment whether a proceeding affects the property than to make an at-times subjective
574 judgment whether a proceeding affects a particular owner. It also could be urged that after a
575 defendant gives notice that it has no objection or defense to the taking, the defendant is interested
576 only in compensation. In a proceeding to condemn more than one piece of property, further, "it"
577 could be read to distinguish among the separate properties.

578 The suggestion that "it" should be carried forward as an ambiguity that cannot be resolved
579 was met with the protest that the ambiguity is so offensive that the Committee must give an answer
580 one way or the other.

581 Further discussion noted that it is possible to imagine real circumstances where the choice
582 makes a difference. Co-owners, for example, may disagree about objecting to the condemnation.
583 If one answers with an objection or defense and the other gives notice that is has no objection or
584 defense, should the one who has no objection or defense be given notice of proceedings to determine
585 whether to condemn the property because the proceedings affect the property? Or should it not be
586 given notice because the proceedings do not affect that defendant? Or both co-owners may agree
587 that taking is proper, and even agree on the appropriate just compensation, but disagree about
588 allocation of the compensation between them. Surely notice must be given of allocation proceedings
589 initiated by one co-owner, even though the proceeding does not seem to affect the property.

590 Several alternatives were suggested. The rule could require notice of "all later proceedings."
591 The difficulty with that alternative lies in condemnation of multiple parcels — many of the owners
592 may have no interest at all in most of the proceedings. Another alternative is to require notice of all
593 later proceedings "relating to that property." "Relating to" would include such proceedings as those
594 to allocate compensation, whether or not they "affect" the property in any meaningful way. Yet
595 another possibility would require notice of later proceedings "affecting the defendant or the
596 property."

597 Professor Rowe pointed to conflicting indicators about the present rule. One treatise states
598 that notice must be given of later proceedings affecting the property, but says nothing further to
599 explain or support this reading. The original Committee Note requires notice of proceedings
600 "affecting him," seeming to refer to the owner.

601 Finding no "canonical answer," it was suggested that the published rule — "affecting the
602 defendant" — should be retained.

603 A motion to substitute "relating to that property" failed, 3 yes and 7 no.

604 A motion to carry forward with the rule as published — "affecting the defendant" — passed
605 with one dissent.

606 Present Rule 71A(h) says that a party "may" have a jury by demanding it. Style Rule
607 71.1(h)(1) says that the court tries all issues except when compensation must be determined "by a
608 jury when a party demands one." A late comment suggested that the Style Rule expands the right
609 to jury trial. It is settled that the Seventh Amendment does not apply to condemnation proceedings,
610 and it was urged that the Style Project should not expand the right. An illustration of a possible
611 problem was given. After a demand for jury trial a court may appoint commissioners, but then
612 conclude that the commissioners are not diligently discharging their duties and take the case back
613 from them. Can the judge then try the case without a jury? The present rule does not clearly address
614 this. It was concluded that there is no reason attempt an answer in the Style Rule. There is no need
615 to change the Style Rule.

616 Rule 73: After renewed discussion of the relationship between the language of Rule 73 and the
617 underlying statute, 28 U.S.C. § 636(c), the Committee adopted these changes in Style Rule 73:

618 **(a) Trial by Consent.** When authorized under 28 U.S.C. § 636(c), a magistrate
619 judge may, if all parties consent, conduct ~~the proceedings in~~ a civil action or
620 proceeding, including a jury or nonjury trial. A record ~~of the proceedings~~
621 must be made in accordance with 28 U.S.C. § 636(c)(5).

622 **(b) Consent Procedure.**

623 **(1) In General.** When a magistrate judge has been designated to conduct
624 civil actions or proceedings, * * *

625 Rule 86(b): A new Rule 86(b) was presented for discussion. Comments on the Style Project
626 expressed concern that the supersession effects of the Civil Rules would be expanded by
627 promulgating the entire body of the Civil Rules to take effect on December 1, 2007. One running
628 example has been used to illustrate the argument. Rule 11 was amended in 1993. In 1995 the
629 Private Securities Litigation Reform Act enacted provisions that conflict with and that supersede
630 Rule 11. Even though Style Rule 11 does not change the meaning of any provision in Rule 11, by
631 taking effect on December 1, 2007, it might be thought to supersede the inconsistent provisions of
632 the PSLRA.

633 The Committee agreed that this supersession argument is not persuasive. The Style Project
634 involves only improved expression of unchanged meaning. It is not intended to affect the
635 relationships between any rule and any conflicting statute. To the contrary, any conflict should be
636 resolved by comparing the first effective dates of the rule provision and of the statute that conflicts
637 with it.

638 The first question is whether it is necessary to say anything, anywhere, about this
639 supersession argument. The argument is so thin that it might not deserve any form of response.
640 There is no indication that the argument was even made with respect to the style revisions taking
641 effect in 1987 to make rules language gender-neutral. Most of the cases that deal with comparable
642 problems look to the first effective date of the rule, disregarding subsequent amendments that change
643 expression but not meaning. The Appellate Rules were restyled without any evident supersession-
644 related concern. In restyling the Criminal Rules, a conflict appeared between Criminal Rule 48(b)
645 and the later-enacted Speedy Trial Act. The Committee Note explains that "[i]n re-promulgating
646 Rule 48(b), the Committee intends no change in the relationship between that rule and the Speedy
647 Trial Act."

648 The argument has been made, however, and may be made again. In addition, there is a pair

649 of cases in the Sixth Circuit that suggest that the argument may prevail by sheer inadvertence. In
650 *Floyd v. U.S. Postal Service*, 6th Cir.1997, 105 F.3d 274, the court found 28 U.S.C. § 1915(a)(3)
651 inconsistent with Appellate Rule 24(a), and concluded that § 1915(a)(3) was later in time and
652 superseded Rule 24(a). Two years later, in *Callihan v. Schneider*, 6th Cir.1999, 178 F.3d 800, 802-
653 804, the court concluded that the Style Project amendment of Rule 24(a) established Rule 24(a) as
654 later in time, so it now superseded § 1915(a)(3). There is no explanation, no recognition of the effect
655 of the fact that the Rule 24 revisions carried forward the rule's meaning without change, and no
656 explanation of the reason for concluding that the supersession relationship should be reversed by a
657 style amendment that was recognized to carry forward the once-superseded meaning.

658 In addition to these Sixth Circuit cases, mixed signals can be found in a few cases that
659 responded to complex relationships between rules and statutes without apparently recognizing or
660 responding to the complexities.

661 Several methods of responding to the supersession question have been considered. One
662 would address the question in a Committee Note, perhaps attached to Rule 1 as part of a general
663 explanation of the Style Project. Another would suggest that the Supreme Court address and negate
664 the supersession argument in the message transmitting the rules to Congress. Still another would
665 be to address the question directly in a rule.

666 Draft Rule 86(b) represents the recommendation to address supersession directly in a rule.
667 This approach is not vulnerable to the charge that it seeks to exercise the supersession authority of
668 28 U.S.C. § 2072(b) to supersede § 2072(b). No circularity is involved because there is no attempt
669 to supersede any statute. To the contrary, the rule expresses a guide to interpreting the Style
670 Amendments — they are not intended to affect the meaning of any rule nor to affect the supersession
671 effect of any rule. The authority to adopt rules of practice and procedure includes authority to define
672 what they mean.

673 The draft presented for discussion read:

674 **(b) December 1, 2007 Amendments.** The amendments adopted on December 1,
675 2007, do not change the date on which any provision that conflicts with
676 another law took effect for purposes of 28 U.S.C. § 2072(b).

677 The Committee Note expanded on this theme, stating in part that if there is a conflict between
678 a rule and another law, "the portion of the rule that conflicts with another law took effect on the day
679 that part of the rule was first adopted."

680 Discussion focused in part on the wisdom of including any provision in the rules at all. The
681 supersession argument is weak. One member observed that the rule "looks twisted around the axle
682 responding to a crazy theory." More generally, it was asked whether future rules amendments would
683 require similar provisions stating that incidental style changes do not affect supersession. On the
684 other hand, the decisions are not as uniform or as uniformly clear as might be wished. And highly
685 respected scholars may find the supersession argument an intriguing — and therefore troubling —
686 concern.

687 The Committee agreed unanimously to develop a Rule 86(b) provision. The draft, however,
688 should be refined. Any rule should refer to the date amendments "take effect," responding not only
689 to the language of § 2072(b) but also to the process by which the Supreme Court adopts the rules but
690 the effective date is delayed until Congress either lets a rule take effect by inaction or acts to
691 establish an effective date.

692 Finding rule text expressions to clearly address the Style Project also came on for discussion.
693 Other amendments are slated to take effect on December 1, 2007, in addition to the Style Project.

694 The Style-Substance Track includes changes that were thought unsuited to the Style Project because
695 they do change meaning, albeit in technical and very limited ways. And new Rule 5.2, reflecting
696 uniform E-Government Act Rules, should take effect then as well. One way to address this question
697 may be to identify the rules by numbers, in groups: Rules 1-5.1, 6-73, and 77-86. [The gaps reflect
698 new Rule 5.2 and the decision to leave idle the numbers for abrogated Rules 74-76.]

699 Other questions addressed the Committee Note. The statement that the amendments do not
700 change the meaning of any rule seems inconsistent with the Style-Substance Track amendments.
701 The suggestion that any conflict between a rule and another law should be decided on December 1,
702 2007 in the same way as it would have been decided on November 30, 2007, although a correct
703 statement of the proposition, was troubling because it seemed to overlook decisions to be made after
704 December 1, 2007. Adding "or thereafter," however, might cause confusion by seeming to freeze
705 a moment of comparison without recognizing future rules amendments.

706 Further discussion suggested that the Committee Note should focus, although briefly, on the
707 central proposition. The Style Project and the Style-Substance amendments are not intended to
708 change the date on which any rule provision took effect for the supersession purpose of determining
709 priority in time. This is a matter of interpreting the rules, not an exercise of the supersession
710 authority.

711 Revised rule text and Committee Note will be circulated to the Committee for review after
712 the meeting.

713 *Style-Substance Track*

714 Two of the published Style-Substance amendments were abandoned. Comments on Style
715 Rule 8(a)(3) established good reasons to maintain the seemingly archaic reference to "relief in the
716 alternative." These words capture the many situations in which the pleader is uncertain as to the
717 available forms of relief, or prefers a form of relief that may not be available. The proposal to amend
718 Rule 36(b) was superseded by the clarification of Style Rule 16(e) noted above. Taken together,
719 Style Rule 16(e) and Style Rule 36(b) apply the "manifest injustice" standard to withdrawal or
720 amendment of an admission adopted at a final pretrial conference.

721 Small style changes were made in two other Style-Substance rules.

722 Rule 30(b)(6) was amended by deleting a comma: "a governmental agency, or other entity~~,~~
723 * * *.

724 Rule 31 was amended by changing the paragraph captions in subdivision (c):

725 **(c) Notice of Completion or filing.**

726 **(1) ~~Notice of~~ Completion.** * * *

727 **(2) ~~Notice of~~ Filing** * * *."

728 The second sentence of the Rule 31 Committee Note also was revised: "A deposition is
729 completed when * * * the deponent has either waived or exercised the ~~Rule 30(e)(1)~~ right of review
730 under Rule 30(e)(1)."

731 *Style Forms*

732 Form 2: The Committee agreed to correct Form 2 by adding a missing opening parenthesis and by
733 transposing the signature lines. The corrected sequence will be signature, printed name, address, e-
734 mail address, and telephone number.

735 Form 10: A comment suggested that the reference to interest in the demand for judgment should read

736 "plus interest as available under applicable law." This suggestion was rejected. The need to
737 ascertain applicable law is plain.

738 Form 19: The form copyright complaint has caused difficulty throughout the Style Project. Present
739 Form 17 was adopted under the Copyright Act of 1909 and was last amended in 1948. It has not
740 been adjusted since enactment of the Copyright Act of 1976. The conversion to Style Project style
741 has not been the subject of comments from people specialized in copyright practice. Department of
742 Justice lawyers reviewed the Style Form and found a substantive error that has been corrected —
743 paragraph 8 no longer implies that there is a common-law remedy for simply continuing to publish
744 and sell an infringing book. It remains to be decided whether there should be a form copyright
745 complaint at all. Discussion asked whether anyone uses the forms — at least one member has never
746 seen a complaint that resembles any form. The role of the forms, however, is illustrative. Judge
747 Clark long ago observed that it is not possible to clearly define the intent of Rule 8 in rule language,
748 but that the forms serve as pictures illustrating the nature of federal pleading requirements. Although
749 the concern remains that the revised Style Form 19 "goes half-way, fixing half the mistakes," the
750 Committee decided to carry Style Form 19 forward.

751 *E-Discovery Amendments*

752 The electronic discovery amendments scheduled to take effect on December 1, 2006, were
753 published and adopted without thorough Style Project review, although many of the Style Project
754 conventions were followed. Early drafts of the electronic discovery amendments followed two
755 tracks, one fitting into the Style Project and one using the present rule language, but the two-track
756 approach was abandoned. Publication of both versions, one recast to fit within the slightly changed
757 structure of the Style Project discovery rules, would have created difficulty if not outright
758 consternation. Drafting to conform the e-discovery amendments to the Style Project has proceeded
759 separately from the main Style Project. Professor Marcus presented the fruits of his labors. He
760 began by noting that he and Professor Kimble had worked through some of the questions presented
761 in the agenda materials, simplifying the task facing the Committee.

762 Rule 26(b)(2)(B): The question raised by Rule 26(b)(2)(B) is whether the subparagraphs in
763 subdivision (b)(2) should be rearranged. The Committee agreed to the first step, merging
764 subparagraph (D) into subparagraph (C):

765 **(C) When Required.** On motion or on its own, ~~T~~the court must limit the frequency
766 or extent * * *.

767 ~~**(D) On Motion or the Court's Own Initiative.** The court may act on motion or on~~
768 ~~its own after reasonable notice.~~

769 Professor Kimble suggested that subparagraphs (B) and (C) be transposed, so the sequence
770 would be "(A) When Permitted," "(B) When Required," and "(C) Electronically Stored Information."
771 This suggestion was resisted. Although the captions may seem to flow more neatly from "permitted"
772 to "required" to e-information as an afterthought, the sequence in which issues arise in practice is
773 better reflected in the current arrangement. (A) deals with general limits likely to be set — if at all
774 — early in the course of managing an action. (B), focusing on discovery of electronically stored
775 information, addresses issues that will arise as a party asserts that some information is not reasonably
776 accessible and the parties then attempt to work out the problem. The court will be asked to act under
777 (C) only if the parties' efforts fail. Beyond this concern, Rule 26(b)(2)(B) has become familiar to
778 practitioners engaged in e-discovery disputes even before it has become effective. It is used to guide
779 practice now. By the time the Style Project takes effect the (b)(2)(B) label will be well known and
780 will be reflected in several — and perhaps many — reported decisions. It should not be changed
781 now. The Committee agreed to retain the present sequence of subparagraphs, but also agreed to

782 change the caption for subparagraph (B): "Specific Limitations for Electronically Stored
783 Information."

784 Rule 26(f)(3): The provision for discussing electronically stored information at the Rule 26(f)
785 conference provided the occasion to revisit an oft-discussed style question. The e-discovery
786 amendments were deliberately written to describe the "form or forms" of production. It has been
787 recognized throughout that "the form" of production can encompass multiple forms, corresponding
788 to the fact that it may be inconvenient or impossible to produce different kinds of electronically
789 stored information in a single form. But the form of production issue has proved contentious in
790 practice. It was decided to emphasize the frequent need to produce in different forms by referring
791 to "form or forms." The question has been renewed in conforming the e-discovery amendments to
792 style conventions. This issue arises repeatedly throughout the e-discovery amendments. Professor
793 Marcus and Professor Kimble worked together to determine how best to reconcile the functional
794 need for emphasis with the style convention to draft in the singular. In some places "form or forms"
795 will remain — Rules 26(f)(3)(C), 34(b)(1)(C), and 45(a)(1)(B) are examples. In other places it may
796 work to retreat to "form" — Rule 34(b)(2)(D) is an example. The SCSSC agreed to the compromise,
797 maintaining the virtues of adhering to style conventions but recognizing the special substantive
798 concerns that have moved the Advisory Committee in addressing this topic.

799 Rule 45(a)(1)(A)(iii) introduces a similar question. The 2006 amendments introduced a new concept
800 to the text of Rule 34 — "documents" may be requested not only for inspection and copying but also
801 for testing and sampling. Rule 45 addresses discovery from nonparties as the analogue to Rule 34
802 discovery among parties. It seems necessary to add "testing, or sampling" in Rule 45(a)(1)(A)(iii)
803 as it defines the "command" of a subpoena. Need "testing and sampling" reappear whenever Rule
804 45 refers to production or inspection and copying? Rule 45 must be made easy to read because it
805 is addressed to nonparties, many of whom have not been involved in the underlying action in any
806 way that would inform them about the issues. But it has not been consistent in approaching the ways
807 of referring to production. Although there is a risk of negative implications, it does not seem
808 worthwhile to constantly repeat "inspecting, copying, testing, or sampling." The Committee decided
809 to leave to Professor Marcus the task of one final review to determine how best to achieve parallel
810 expression without unnecessary repetition.

811 Rule 45(d): This rule presented some questions readily answered and another that proved difficult.

812 As a matter of style, the phrases appearing in paragraphs (1)(B), (C), and (D) as variations
813 on "person responding ~~to a subpoena~~" were shortened as marked by deleting "to a[the] subpoena."
814 Paragraph (1)(B) was further amended by adding two words: "or in a reasonably usable form or
815 forms ~~that are reasonably usable~~;" And two words were deleted from (2)(B): If information ~~is~~
816 produced in response to a subpoena ~~that~~ is subject to a claim of privilege * * *."

817 The introduction to (d)(1) proved much more difficult. The e-discovery amendments
818 changed Rule 34(b)(2)(D) but failed to make a corresponding change in Rule 45(d)(1). The agenda
819 materials showed the addition of a parallel change in Rule 45(d)(1): "Unless the parties and the
820 person responding to a subpoena otherwise agree, or the court otherwise orders, these procedures
821 apply to producing documents or electronically stored information for production: * * *."
822 Discussion showed that the problem is more difficult in Rule 45 than in Rule 34. Even in a two-
823 party action three persons are interested in Rule 45 nonparty subpoena. The draft rule language
824 seems to require agreement among all parties, not only the party serving the subpoena, and the
825 person responding to the subpoena. But in practice the party serving the subpoena commonly works
826 out the objections with the person responding and notifies the other parties. The other parties are
827 not put in a position to block the agreement. They can object, or can serve their own subpoenas, if
828 the agreement threatens to deprive them of desired information. Problems remain even on this
829 practice — different parties may have different levels of interest in the form of production,

830 particularly with electronically stored information. A nonparty who produces in one form in
831 response to an initial subpoena may argue that it should not be required to produce the same
832 information in a different form in response to a second subpoena served by a different party.

833 In the end it was agreed that it is too late to attempt to establish in Rule 45(d)(1) a provision
834 that draws from Rule 34(b)(2)(D) with suitable modifications to fit the nonparty subpoena situation.
835 The draft will be simplified. Subject to further style work, (d)(1) may begin:

836 **(1) Producing Documents or Electronically Stored Information.** ~~Unless the~~
837 ~~parties and the person responding to a subpoena otherwise agree, or the court~~
838 ~~otherwise orders, t~~These procedures apply to producing documents or
839 electronically stored information for inspection: * * *

840 *Time Counting Project*

841 Judge Rosenthal noted that work on the Civil Rules time provisions will have to proceed on
842 a tight schedule over the summer. The next meeting is set for early September. Two subcommittees
843 are designated, each to consider half of the rules. It will be important to coordinate the two
844 subcommittees as common questions arise. But the allocation of rules between them attempts to
845 bring together rules that obviously present common questions. Rules 50, 52, 59, and 60, for
846 example, establish time limits for post-judgment motions. Rule 6(b) prohibits extension of any of
847 these periods. They should be assigned to the same subcommittee, and to the same members of that
848 subcommittee. Final recommendations must be ready in time for submission to the Standing
849 Committee in the spring of 2007. The first step, however, is to consider the "template" prepared by
850 the Standing Committee's Time-Computation Subcommittee. The template has conveniently been
851 framed as Civil Rule 6(a).

852 The template's central feature is abolition of the "eleven-day" rule that omits intervening
853 Saturdays, Sundays, and legal holidays in computing periods of less than eleven days. Abolition is
854 not left to chance — the template not only says "count every day," it also says "including
855 intermediate Saturdays, Sundays, and legal holidays." The redundant inclusion was added for fear
856 that practitioners accustomed to the present system might otherwise hesitate to believe and rely on
857 a simply direction to count every day. This feature will require reconsideration of every period now
858 set at 10 days or less. As the rule now stands, a 10-day period in fact means a minimum of 14 days.
859 When three-day holiday weekends intervene, it can run still longer. Shorter periods, however, are
860 more variable. The two-day period set by Rule 65(b) for notice of a motion to dissolve a temporary
861 restraining order, for example, can readily mean two days because it expires before reaching a
862 weekend.

863 Abolition of the eleven-day rule presents a question that needs to be thought through. Rule
864 6(a) establishes rules that "apply in computing any time period specified in these rules or in any local
865 rule, court order, or statute." Each district may need to survey its own local rules to determine
866 whether adjustments are appropriate. That can be managed. Greater difficulty arises with respect
867 to statutory time periods. Two illustrations that apply to civil practice are provided by 28 U.S.C.A.
868 § 1292(b) (ten days to seek permission for an interlocutory appeal) and § 1453(c)(1) (7 days to ask
869 a court of appeals to accept appeal from a remand order). As to statutory periods, each of the
870 obvious alternatives presents a problem. If nothing is done, the real duration of these statutory
871 periods is shortened. If the eleven-day rule is preserved for statutory periods alone, practitioners may
872 encounter even greater confusion than they encounter with the present rule. And an attempt to adopt
873 specific periods, statute-by-statute, must inevitably overlook some statutes and seem an arrogant
874 assertion of supersession authority as to the statutory periods that are revised. It may be argued that
875 extension of specific statutory periods by rule simply carries forward the effects long since
876 established by Rule 6(a), but the appearance will be different.

877 The Committee Note advises that the method used to measure periods expressed in days also
878 applies to periods expressed in weeks, months, and years. The Civil Rules do not appear to define
879 any periods in weeks or months. Civil Rule 60(b) sets an outer limit of one year for some motions.
880 There is no definition of what is a year — whether always 365 days, or 366 days if a leap year is
881 involved.

882 The template also introduces a new feature, describing a method for counting periods
883 expressed in hours. This paragraph is a response to at least one statute, and several pending bills,
884 that set such periods. It is a useful answer to questions that otherwise must cause great perplexity.

885 The template also addresses calculation of periods that must be counted backward from an
886 end-point. Rule 56(c), for example, requires that a motion for summary judgment be served at least
887 10 days before the day set for the hearing. The template — as clearly expressed in the Committee
888 Note — contemplates that this period be determined by continuing to count in the same direction.
889 If the 10th day before the hearing day is a Saturday, the motion must be served on Friday. This
890 approach reduces the time available to the moving party, but increases the time available to the
891 responding party.

892 The Time-Computation Subcommittee recommends that the advisory committees consider
893 two sets of provisions left unchanged by the template rule. Rule 6(a) excludes the last day of a
894 period when weather "or other conditions" make the clerk's office inaccessible. Adapting this
895 provision to failures of electronic filing may prove difficult. And Rule 6(e) allows an additional
896 three days to act in response to a paper that is served by any means other than personal service,
897 perhaps skewing strategic incentives in choosing among the modes of service. Beyond these
898 provisions, this Committee may wish to consider the part of Rule 6(b) that prohibits extensions of
899 some time periods. This provision causes grief to lawyers who rely on the general authority to
900 extend without bothering to look for the specific prohibition.

901 A first question in approaching reconsideration of time periods is to decide whether there is
902 any view that the collective set of time periods is too generous or too stingy. Is an overly generous
903 approach to time responsible for undue expense and delay? Or is an unreasonably stingy approach
904 responsible for unduly compressed work, tacit but risky disregard of deadlines, or widespread
905 modification by agreement? Are time periods that have endured for many years simply out of touch
906 with increasingly complex forms of litigation that cannot be managed in periods that were reasonable
907 for simpler forms? Or is judicial management, particularly through Rule 16, sufficient to account
908 for the cases that do not fit comfortably within the general rules? It was agreed that the overall
909 approach in the rules is not unduly generous. In the end, the Committee agreed that there is no
910 reason to adopt a general preference, either to generally shorten or generally extend present periods.
911 Instead, each time period should be evaluated in its own terms.

912 The Rule 6(a) problem of electronic inaccessibility begins with present rule language that
913 seems to focus on physical barriers. "[W]eather or other conditions" does not obviously address
914 interruptions in the court's capacity to receive electronic communications, nor difficulties that may
915 arise in a filer's computer system. This impression is reinforced by the preface: "when the act to be
916 done is the filing of a paper in court." Although Rule 5(e) defines an electronic filing as a paper,
917 there is no direct clarification of Rule 6(a). Rule 6(a) could be written to address "a filing in court,"
918 and "a day on which the clerk's office is inaccessible." But those steps still would not speak directly
919 to electronic impediments to electronic filing.

920 The problem of filing impediments is exacerbated by the phenomenon that although lawyers
921 know they should not wait to file on the last permissible moment, many frequently do delay.

922 One peculiar aspect of electronic filing impediments is that they may be more likely than
923 physical impediments to arise for brief periods. The court's system can fail briefly, return to service,

924 fail again, and so on. If an express provision is to be written, what should it say about the duration
925 of the failure and about the time of day when the failure occurs? Should a one-hour failure at the
926 end of the day be treated differently than a two-hour failure in the morning? Should this and like
927 problems be treated by leaving matters to the discretion of the judge? A discretionary approach does
928 not give the comfort of clear rules, but it may be as much relief as can be tolerated. Still, it might
929 work to allow filing the day after any day on which the court's system was unable to receive e-filings
930 for any measurable period.

931 A different question was raised by asking whether we should expect lawyers to be prepared
932 to file in paper if the e-filing system is down, and to file electronically if the court is not physically
933 accessible? One answer was that the whole purpose of converting to e-filing would be defeated by
934 requiring constant readiness to file in paper. "Inaccessible" should mean that the court is physically
935 inaccessible or that e-filing is not possible. A suggestion that the Committee Note might say that
936 there is no requirement of substitute paper filing when the e-filing system is down was met, however,
937 with the response that such matters should be addressed in rule text or not at all.

938 A similar question was raised by observing that a lawyer in San Francisco can work until
939 9:00 Pacific Time and still file electronically just before midnight in the Southern District of New
940 York. That opportunity becomes something that lawyers rely on. If we want them to be able to rely
941 on it safely, we should be clear about it. It would be possible to define when a day ends. The most
942 likely choices would be the period when the clerk's office is open or midnight. Some courts accept
943 e-filings up to midnight. Some accept paper filings up to midnight as well, relying on a "drop box."
944 But other courts do not have drop boxes, and the likelihood is that security considerations and
945 electronic filing will reduce or eliminate them altogether. It is possible that variations in local
946 circumstances make it difficult to adopt a uniform national rule. But consideration should be given
947 — perhaps with help from the Time-Computation Subcommittee — to defining the end of the day.
948 It may be that different definitions are suitable for paper filing and for e-filing. Midnight would do
949 for e-filing as a national rule; for paper filings, when they are permitted, extension beyond regular
950 business hours might be left to local rules.

951 Further discussion suggested that it would be better to begin afresh, departing from the
952 "inaccessible office" concept. Three different concerns should be considered: physical
953 inaccessibility, inability of the court's e-filing system to receive a filing, and inability of a filer's
954 system to make a filing. Allowance also must be made for parties, such as pro se litigants, who are
955 exempted from otherwise mandatory e-filing systems.

956 The question of failures in the filer's computer system raises issues that are difficult to police.
957 Most lawyers will be honest. And allowing an extra day for filing "won't hurt anyone." "If you
958 never excuse a sending-end crash, lawyers will have to invest huge amounts in technology." But
959 there is room for some maneuvering or even abuse. Perhaps more importantly, express allowance
960 for filers' problems is likely to invite disputes. It may be better to rely on the general authority to
961 excuse a failure and to extend the time to act. That approach encounters difficulty with the time
962 periods that cannot be extended — the 10-day periods set in Rules 50, 52, and 59 are the most
963 sensitive. If the problem seems severe enough, it might be possible to amend Rule 6(b) to allow
964 extension of those periods for e-filing failures. Tactical abuse of the opportunity might not be a
965 problem, at least so long as those periods are treated as mandatory and jurisdictional. Few lawyers
966 would risk loss of the opportunity to make those motions by relying on the court's willingness to
967 grant an extension of a day or two to offset an e-filing mishap.

968 The e-filing problem should be considered by the Standing Committee Technology
969 Subcommittee. Meanwhile, the approach to Rule 6(a) will be to adopt open terms that are not
970 limited to physical inaccessibility but that do not directly address e-filing mishaps. The reference
971 to filing a "paper" will be changed to a neutral "filing." Nothing will be said about problems on the

972 filer's end.

973 The question of legal holidays was addressed by asking whether the definition of "legal
974 holiday" should include a day declared a holiday by the state where the court is held. Deference to
975 local holidays is strongly supported by the desire for uniformity among local courts. Many lawyers
976 in Massachusetts, for example, might not pause to inquire whether Patriots Day is an occasion for
977 closing federal courts. The Time-Computation Subcommittee should consider this question. The
978 question is further complicated by local district practices. At least some districts are likely to close
979 on Friday after Thanksgiving, or after a Thursday Christmas Day, even though those days do not
980 meet any of the Rule 6(a) definitions of "legal holiday." Perhaps the definition should be revised to
981 exclude the last day of the period whenever the clerk's office is closed on that day, no matter what
982 the reason. At the end, a question went unanswered — is there any state that has half-day holidays?
983 Or court that closes for half a day?

984 Rule 6(b) presents a different question. It forbids extension of the periods set by several
985 rules. It continues to be the source of grief. The court cannot extend the time to file post-judgment
986 motions under Rules 50, 52, or 59, nor can it extend the time to file a motion to vacate under Rule
987 60. The Rule 50, 52, and 59 periods tie to the time to appeal. Lawyers continue to lose the
988 opportunity to win post-judgment relief because they fail to meet the 10-day deadline. At times they
989 lose the right to appeal by relying on an untimely motion to suspend appeal time in the way that a
990 timely motion would do. And on rare occasions they are caught in a trap when the district court
991 mistakenly attempts to grant a forbidden extension. Reliance on an unauthorized extension as an
992 excuse to extend appeal time under the "exceptional circumstances" doctrine almost always fails.
993 Nonetheless, the rules are clear. And they serve important purposes, seeking to achieve prompt
994 consideration and disposition of post-trial motions, and to expedite appeals. Any attempt to permit
995 even limited flexibility could defeat these purposes. This question will be considered, but the case
996 for change remains to be made.

997 The Time-Computation Subcommittee decided to retain the extra three days provided by
998 Rule 6(e) for acting in response to service by means other than personal service. But it was
999 concerned that any distinction among methods of service — or the absence of any distinction —
1000 might affect strategic choices among the methods. It seems sad that lawyers would attempt to select
1001 the method of service best calculated to reduce the effective time available to respond. But such
1002 tactical calculations seem common. This question too remains open for consideration.

1003 Turning to one final question, it was agreed that time computations will be facilitated if
1004 individual periods are expressed in multiples of seven days. That approach will minimize the
1005 occasions when a period ends on a Saturday or Sunday. Periods now set at 10 days are likely to
1006 become 14 days, although some — such as the 10-day period set for a temporary restraining order
1007 — may require separate deliberation.

1008 *Rules 13(f), 15*

1009 Judge Baylson presented the report of the Rule 15 Subcommittee. The first proposal would
1010 amend Rule 15(a) by changing the periods in which a party may amend a pleading "once as a matter
1011 of course." Present Rule 15(a) allows amendment within 20 days if a responsive pleading is not
1012 allowed and the action is not yet on the trial calendar. The proposal would change the period to 21
1013 days, anticipating a preference for multiples of seven in the Time-Computation Project. It also
1014 would delete the reference to the trial calendar. Many courts do not have a trial calendar, and Style
1015 Rule 40 will eliminate the former reference to the trial calendar.

1016 More important changes are recommended for a pleading to which a responsive pleading is
1017 required. Present Rule 15(a) terminates the right to amend once as a matter of course after a
1018 responsive pleading is served. The proposal would extend the right to 21 days after service of a

1019 responsive pleading. This expansion matches a contraction for cases in which the pleading is
1020 challenged by a motion before the responsive pleading is served. Because a motion is not a
1021 "pleading" as defined in Rule 7, a motion does not now cut off the right to amend once as a matter
1022 of course. The right persists indefinitely. Some judges regularly encounter the frustration of
1023 investing time in a motion only to find an amendment of the challenged pleading. The proposed
1024 amendment would terminate the right to amend once as a matter of course 21 days after service of
1025 a motion under Rule 12(b), (e), or (f) addressed to the pleading. The amendment will support better
1026 judicial management and expedite disposition.

1027 The draft was improved: "A party may amend ~~a party's~~ its pleading once * * *."

1028 Discussion began with support of the 21-day limit to amend after service of a responsive
1029 motion. This was seen as the most important part of the amendment. Doubts were expressed about
1030 extending the right to amend to 21 days after service of a responsive pleading. The opportunity may
1031 be used not for curative purposes "but to throw in bad changes." These doubts were met by the
1032 observation that a pleader recognizes the importance of the first amendment. After one amendment,
1033 it becomes more difficult to win permission to make another amendment. "Taking the first shot will
1034 be a matter for care."

1035 Another question asked what happens to the motion if the challenged pleading is amended
1036 before the motion is decided. The answer was that practice would carry on as at present — the only
1037 difference is that the amendment must be made earlier than may happen now. The amendment may
1038 moot the motion. It may require that the motion be amended or be superseded by a new motion. The
1039 parties and court will respond as the circumstances dictate.

1040 The proposed amendment of Rule 15(a) was approved as a recommendation for publication.
1041 The Committee Note should include a statement that the abrogation of Rule 13(f), as discussed next,
1042 establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim.

1043 Turning to Rule 13(f), Judge Baylson described the recommendation to abrogate. Under Rule
1044 13(f) the court may permit a party to amend a pleading to add a counterclaim. On its face, the rule
1045 invokes the amendment process. Both Rule 15(a)(2) and Rule 13(f) speak of allowing amendment
1046 if "justice so requires." Rule 13(f) adds a set of other words not in Rule 15(a): "if [the counterclaim]
1047 was omitted through oversight, inadvertence, or excusable neglect." Despite these additional words,
1048 courts apparently administer Rule 13(f) as if it repeated Rule 15(a) verbatim. Nor is there any reason
1049 to suppose that the standards for permitting amendment should be different. Abrogation of Rule
1050 13(f), finally, will end any lingering uncertainty whether the relation-back tests of Rule 15(c) apply
1051 to an amendment that adds a counterclaim.

1052 Abrogation of Rule 13(f) was approved without dissent. Publication will be recommended
1053 to the Standing Committee.

1054 Judge Baylson then turned to Rule 15(c), a topic that divided the Subcommittee. The
1055 Committee first put Rule 15(c) on the agenda in response to the suggestion of a first-year law
1056 student. The suggestion addressed a very specific point. A few courts had then taken a view of Rule
1057 15(c)(3) that now has been adopted by several circuits. Relation back of an amendment changing
1058 the party against whom a claim is asserted requires that the new party have received notice that but
1059 for some "mistake" concerning the identity of the proper party, the new party would have been sued.
1060 "[M]istake" is read to cover only a claimant who erroneously believes that the right defendant has
1061 been identified. If the claimant knows that it cannot identify the proper defendant, there is no
1062 "mistake," but only ignorance. This interpretation could easily be changed by adding four words:
1063 "mistake <u>or lack of information</u>." Consideration of this simple change, later strongly urged by Judge
1064 Becker in *Singletary v. Pennsylvania Department of Corrections*, 3d Cir.2001, 266 F.3d 186,
1065 gradually grew into an elaborate study of Rule 15(c). The study found many conceptual

1066 shortcomings in the rule, but at the same time found little indication that the shortcomings have any
1067 significant effect on practice.

1068 One of the glaring conceptual difficulties with Rule 15(c)(3) is its reliance on notice to the
1069 new defendant "within the period provided by Rule 4(m) for service of the summons and complaint."
1070 Apart from other problems, Rule 4(m) does not set a firm 120-day period. It allows extensions. The
1071 1991 Committee Note observes that Rule 15(c)(3) "allows not only the 120 days specified in [Rule
1072 4(m)], but also any additional time resulting from any extension ordered by the court pursuant to that
1073 rule, as may be granted, for example, if the defendant is a fugitive from service of the summons."
1074 Since the Note refers to an extension "pursuant to" Rule 4(m), and since the only example refers to
1075 reasons that relate only to serving process, it is easy to conclude that the incorporation of Rule 4(m)
1076 does not create an open-ended authorization to defeat the statute of limitations by granting an
1077 extension whenever the court would prefer to proceed to the merits. But it also can be argued that
1078 incorporation of Rule 4(m) creates such open-ended authority as to defeat limitations defenses in the
1079 court's discretion.

1080 Two Subcommittee members, drawing from the view that Rule 15(c)(3) now effectively
1081 establishes discretion to suspend a limitations defense for a defendant not initially named, proposed
1082 two broad amendments. One would respond to concerns that Rule 15(c) subverts state limitations
1083 periods by limiting what now are paragraphs (2) and (3) — to become Style Rule 15(c)(1)(B) and
1084 (C) — to a claim or defense governed by federal law. The second would create discretion to allow
1085 joinder of a new defendant, to be guided by the claimant's diligence in identifying the new defendant
1086 and in seeking amendment, and by finding that the new defendant would not be prejudiced in
1087 defending on the merits. In the Style version, the proposal would be:

1088 **(c) Relation Back of Amendments.**

1089 **(1)** ***When an Amendment May Relate Back.*** An amendment to a pleading relates
1090 back to the date of the original pleading when: * * *

1091 **(B)** the amendment asserts a claim or defense that is governed by federal law
1092 and that arose out of the conduct, transaction, or occurrence set out —
1093 or attempted to be set out — in the original pleading; or

1094 **(C)** the amendment changes the name or the identity of — or adds — a party
1095 against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied, and
1096 the court finds:

1097 **(i)** the pleader has exercised diligence in ascertaining the name of the
1098 party;

1099 **(ii)** the amendment is sought within a reasonable time after serving
1100 the pleading on the other parties against whom the claim is
1101 asserted; and

1102 **(iii)** the party to be added, identified, or named will not be prejudiced
1103 in defending on the merits.

1104 Subcommittee members who support this approach believe that it carries forward the
1105 increasingly broad set of doctrines used to suspend the running of limitations periods. Definition
1106 of the time a claim arose, concepts of estoppel and fraudulent concealment, and other approaches
1107 have undermined the seeming precision of limitations periods.

1108 Those who oppose the proposal begin by doubting the view that the incorporation of Rule
1109 4(m) authorizes a court to defeat a valid limitations defense by the simple act of pretending to extend
1110 the time to serve process for reasons that have nothing to do with difficulties in effecting service.
1111 Rule 15(c) applies only when the court cannot find that notice to a defendant was timely within
1112 established limitations doctrine. The court can legitimately employ all of the devices used to
1113 interpret the limitations statute first. But if it cannot find a way to escape the limitations bar, there
1114 is no reason to use Rule 15(c) to establish a new discretion. This discretion would be especially
1115 peculiar because it could not be established for a claim against a defendant properly named in the
1116 original pleading. If limitations doctrine bars the claim then, no one would contend that the Enabling
1117 Act should be used to create new limitations doctrine that allows an untimely claim if the court finds
1118 the plaintiff was diligent and the defendant would not be prejudiced.

1119 The Enabling Act question was pressed further. One member suggested doubts about the
1120 legitimacy of present Rule 15(c)(2) and (3), and urged that an attempt to broaden relation-back rules
1121 might end up by forcing repeal of present rules that do have a legitimate function in correcting what
1122 are truly procedural errors. The decision in *Schiavone v.Fortune*, 1986, 477 U.S. 21, that present
1123 Rule 15(c) aims to correct is an example of circumstances that properly allow relation back.

1124 Further doubts were expressed about the wisdom of tangling with the many problems
1125 identified in the supporting Rule 15 materials. At least until conceptual confusion is matched by
1126 practical difficulties, it is better to let Rule 15(c) rest as it is.

1127 Attention turned to the narrower question whether to expand the concept of "mistake" by
1128 adding "or lack of information." The question commonly arises in actions against police officers.
1129 The plaintiff cannot identify the officer claimed to have violated the Fourth Amendment without
1130 filing suit and using discovery. The alternative of filing the action well before the limitations period
1131 has run is not always practicable. The desire to help such plaintiffs has not generated any strong
1132 support for expanding Rule 27 to authorize discovery to aid in bringing an action. An expanded
1133 relation-back doctrine seems attractive in this setting. But "the context is broader than police
1134 officers." The Department of Justice often encounters "Bivens" complaints that include numbers of
1135 "unknown-named" federal agents in circumstances that threaten broad intrusions on limitations
1136 periods.

1137 The issues are difficult. The Committee is not shy about tackling difficult issues. But it
1138 seems wise to take on difficult issues only when there is a clear problem in practice. The balance
1139 between difficulty and need seems close.

1140 A motion to remove further work on Rule 15(c) from the agenda was adopted, 7 yes and 5
1141 no.

1142 *Rule 48 — Jury Polling*

1143 The Committee decided in October 2005 to give final consideration this month to a proposal
1144 to recommend publication of a jury polling provision as part of Rule 48. The draft proposal is taken
1145 nearly verbatim from Criminal Rule 31(d), honoring the preference to avoid discrepancies between
1146 parallel provisions that may generate unwarranted implications. But one departure from Rule 31(d)
1147 is necessary and another seems desirable. Rule 48 allows the parties to stipulate to a nonunanimous
1148 verdict; the Criminal Rules have no parallel provision. Criminal Rule 31(d) provides that if the poll
1149 reveals a lack of unanimity, the court may "declare a mistrial and discharge the jury." Although

1150 those words are not inaccurate in a civil trial, they are tailored to the double-jeopardy concerns that
1151 surround mistrial in a criminal prosecution. The Civil Rules refer simply to a "new trial" in the
1152 parallel provisions of Rule 49(b) that address inconsistencies when a general verdict is accompanied
1153 by interrogatories. The Committee agreed that the new part of Rule 48, to become subdivision (c),
1154 would read:

1155 **(c) Polling.** After a verdict is returned but before the jury is discharged, the court must on
1156 a party's request, or may on its own, poll the jurors individually. If the poll reveals
1157 a lack of unanimity or assent by the number of jurors required by the parties'
1158 stipulation, the court may direct the jury to deliberate further or may order a new trial.

1159 The question whether the court must carry through with the new trial in every case was
1160 answered with a clear "no." A properly preserved motion for judgment as a matter of law can be
1161 renewed under Rule 50(b), corresponding to what once was called judgment notwithstanding the
1162 jury's failure to agree. If that fails, a new trial order simply returns the case to pretrial mode. The
1163 parties can settle. Summary judgment is available — and the record of the first trial provides an
1164 excellent starting point for showing what evidence is available. The direction to "order a new trial"
1165 does not change the usual incidents of a new trial order.

1166 The October meeting noted a question presented by the argument in a pending Tenth Circuit
1167 case that by requiring that the jurors be polled "individually" Criminal Rule 31(d) requires one-by-
1168 one polling apart from all other jurors. That is not the traditional method of polling. There are good
1169 reasons to conduct the poll in front of the entire jury. The argument was rejected by the Tenth
1170 Circuit. It seems safe to adhere to the language of Criminal Rule 31(d).

1171 Rule 48 became the occasion for discussing the timing of publication. The Standing
1172 Committee has already approved publication at a future date of a modest Rule 8(c) amendment. The
1173 recommendations to publish amendments of Rules 13, 15, and 48, along with a new Rule 62.1, raise
1174 the question whether the time has come to provide some respite for the bench and bar. The e-
1175 discovery amendments and other important new rules and amendments are on track to take effect
1176 on December 1, 2006. The Style amendments still are aimed to take effect on December 1, 2007.
1177 Becoming familiar with all of these changes will take time. Proposals published for comment in
1178 2006 would be on track to take effect on December 1, 2008. Although none of the current proposals
1179 would effect a dramatic change, it may be better to defer publication. Other advisory committees
1180 have deferred publication of proposals otherwise ready in order to assemble a larger bundle for
1181 publication. On the other hand, account must also be taken of the size of the eventual publication
1182 bundle. Work is proceeding on the Time-Computation Project. If the time rules are published in
1183 2007, other proposals may be lost in the shadows of time. This effect would be enhanced if work
1184 on summary judgment or pleading proceed on a pace for publication in 2007. The Committee
1185 concluded that the time for publication should be decided by the Standing Committee after
1186 consultation with Judge Levi and Reporter Coquillette.

1187 *Rules 54(d), 58(c)(2), Appellate 4*

1188 Professor Gensler reported his conclusions on the Appellate Rules Committee's
1189 recommendation that the Civil Rules be amended to impose a deadline for exercising the Rule
1190 58(c)(2) (Style Rule 58(e)) authority to suspend appeal time when a timely motion for attorney fees
1191 is made.

1192 The origin of Rule 58(c)(2) lies in the Supreme Court ruling that a timely motion for attorney
1193 fees does not affect the finality of a judgment on the merits. The fee demand is not a "claim" for
1194 purposes of Rule 54(b), so disposition of all "claims" in the case establishes a final judgment. Nor

1195 is the fee motion one to alter or amend the judgment, so it does not count as a Rule 59(e) motion that
1196 suspends appeal time under Appellate Rule 4. If it were not for Rule 58(c)(2), the result would be
1197 that a party wishing to appeal judgment on the merits must file a notice of appeal within the allotted
1198 time or lose the right to appeal. That result is sound when it is better to have the appeal on the merits
1199 decided before the attorney-fee questions are decided by the district court. But it can be a source of
1200 difficulty when it would be better to present both merits and the fee issues in a single appeal.

1201 The response of Rule 58(c)(2) is to establish the district court's authority to decide whether
1202 a fee motion should suspend appeal time. It is not easy for a tyro to unravel the rule. As stated in
1203 Style Rule 58(e):

1204 But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may
1205 act before a notice of appeal has been filed and become effective to order that the
1206 motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a
1207 timely motion under Rule 59.

1208 The Sixth Circuit had to wrestle with this provision in *Wikol ex rel. Wikol v. Birmingham*
1209 *Public Schools*, 6th Cir. 2004, 360 F.3d 604, lamenting the difficulty of working through four rules
1210 to find an answer. Its opinion also reflects the absence of any explicit provision in Rule 58 that cuts
1211 off the time for seeking an order when there is no notice of appeal. It would be possible to read the
1212 rule literally to support an argument that so long as there is a timely fee motion the court can suspend
1213 the time to appeal on the merits long after the time to appeal has run. Judgment is entered in Day
1214 1. A timely fee motion is made on Day 12. Days march by and the time to appeal on the merits
1215 expires. On Day 150 the court rules on the fee motion. On Day 160 a party moves for an order that
1216 the timely fee motion has the effect of suspending time to appeal on the merits. Because no notice
1217 of appeal has yet been filed, Rule 58 might seem to allow the order. Few courts are likely to grant
1218 such an order. The more plausible reading, moreover, is that the court must act while it is still
1219 possible to file an appeal notice that will become effective.

1220 The complexity of these rules is not welcome. But the experience of Appellate Rule 4 is
1221 instructive. Provisions that ought to be clear on careful reading have been continually amended to
1222 meet the challenge of careless reading. Lawyers continue to lose the opportunity to appeal
1223 nonetheless. Surrender to careless practice, however, would carry a high price. There are good
1224 reasons for complexity. Post-judgment motions should be timely made. Rule 6(b), indeed,
1225 specifically prohibits extensions of time. Appeal time is taken very seriously — only recently has
1226 there been any room even to question the "mandatory and jurisdictional" characterization.
1227 Integrating these provisions is complicated by the concern that one party should not be able to defeat
1228 another's opportunity to make a timely post-judgment motion by immediately filing a preemptive
1229 notice of appeal. The desire to protect appellants who file premature notices of appeal, or who file
1230 a timely notice that then is suspended by a post-judgment motion, leads to further complexity. Great
1231 care must be taken in considering still further complications.

1232 The potential gap in Rule 58 could be addressed by adding one word — the court must act
1233 before a "timely" notice of appeal has been filed and has become effective. This amendment,
1234 however, would not reduce the complexity of the rules' interplay. Other attempts to fix the rule by
1235 requiring that a motion to suspend appeal be made — that the district court act — within the original
1236 appeal time encounter the difficulty that a case order or local rule may set the time to move for
1237 attorney fees beyond the appeal period.

1238 Confronting these perplexities last October, the Committee asked the Federal Judicial Center
1239 to study actual use of Rule 58 in practice. The first phase of the study initially examined a sample
1240 of more than 8,500 cases terminated over the last eleven years in eight districts. Then it went on to
1241 examine at least 200,000 docket sheets that combine references to attorney fees, appeal, and extend.

1242 This phase found almost no evidence that Rule 58 is used to suspend appeal time. The second phase
1243 responded to the observation that reported opinions do reflect simultaneous consideration on appeal
1244 of the merits and attorney fee awards. Nineteen of these cases were identified. The circumstances
1245 that led to combined consideration varied, but almost invariably seemed "legitimate" in the sense that
1246 the district court had not deliberately delayed entry of judgment on the merits for the purpose of
1247 resolving attorney-fee issues.

1248 Docket-sheet research of this sort may overlook some cases. But it provides a reliable
1249 indication that courts are not encountering widespread difficulty with the tightly drawn maze
1250 established by the combination of Civil Rules 54 and 58 with Appellate Rule 4.

1251 The Federal Judicial Center was thanked for its work and help.

1252 The Committee concluded that there is not sufficient need to justify the risks of further
1253 rulemaking in this area. This conclusion will be reported to the Appellate Rules Committee so that
1254 further work can be undertaken if it reaches a different conclusion.

1255 *Rule "62.1" — Indicative Rulings*

1256 The "indicative rulings" question has remained on the agenda for a few years. It began with
1257 a recommendation by the Solicitor General to the Appellate Rules Committee. The Appellate Rules
1258 Committee concluded that any rule change should be made in the Civil Rules because the question
1259 arises most frequently in civil practice and also because the answers are better developed in civil
1260 actions.

1261 The clear starting point is provided by cases that deal with a Civil Rule 60(b) motion to
1262 vacate a judgment that is pending on appeal. Almost all circuits agree on a common approach. They
1263 begin with the theory that a pending appeal transfers jurisdiction of a case to the court of appeals.
1264 The district court lacks jurisdiction to affect the judgment. At the same time, there are important
1265 reasons to allow the district court to consider the motion. The appeal does not suspend the time
1266 limits of Rule 60(b) — the motion still must be made within a reasonable time, and there is a one-
1267 year outer limit if the motion relies on the grounds expressed in paragraphs (1), (2), and (3). The
1268 district court, moreover, is commonly in a better position to determine whether the motion should
1269 be granted. These competing concerns are reconciled by holding that the district court can entertain
1270 the motion and can either deny the motion or indicate that it would grant the motion if the court of
1271 appeals remands for that purpose. Some courts introduce modest variations, but the core remains
1272 — the district court can, if it wishes, consider the motion pending appeal, but cannot grant it absent
1273 a remand for that purpose.

1274 Although the practice is well settled under Rule 60(b), several reasons are advanced for
1275 expressing it in a rule. A national rule would eliminate the minor disuniformities among the circuits.
1276 It would give clear notice of a practice that remains unfamiliar to many lawyers and to at least a few
1277 judges. It could establish useful procedural incidents, such as a requirement that the movant inform
1278 the court of appeals both when the motion is filed and again when the district court acts on the
1279 motion. It might — although this is a sensitive issue — prove useful when the parties wish to settle
1280 pending appeal but are able to reach agreement only if there is a firm assurance that the district court
1281 is willing to vacate its judgment upon settlement.

1282 A more general purpose would be served by adopting a new rule that is not confined to Rule
1283 60(b) motions. A new rule — tentatively numbered Rule 62.1 — could address all situations in
1284 which a pending appeal ousts district court authority to act.

1285 Discussion began with the impact on settlement pending appeal. The Supreme Court has
1286 suggested that a court of appeals should vacate a judgment to reflect a settlement on appeal only in

1287 "exceptional circumstances." But it suggested at the same time that without considering whether
1288 there are exceptional circumstances, the court of appeals may remand to the district court to consider
1289 the parties's request to vacate, "which it may do pursuant to Federal Rule of Procedure 60(b)." *U.S.*
1290 *Bancorp Mort. Co. v. Bonner Mall Partnership*, 1994, 513 U.S. 18. District-court consideration is
1291 an accepted practice. Recognizing the practice in the rule "does not put any weight on the scales;
1292 it does not make it more likely that a request to vacate will be granted." Further support was offered
1293 with the observation that "in the settlement context you want assurance the settlement will go
1294 through and the judgment will be vacated." Each of the alternative drafts supports remand for this
1295 purpose.

1296 The Department of Justice prefers adoption of a broader rule that reaches beyond Rule 60(b).
1297 The established Rule 60(b) procedure has proved useful. It introduces a structured dialogue between
1298 the trial court and the appellate court that can be useful in other settings as well. An express rule will
1299 not create a new procedure. It will only make an established procedure more accessible. Adopting
1300 a rule confined to Rule 60(b) motions, on the other hand, might be read to imply that the same useful
1301 procedure should not be followed in other circumstances. The Rule 62.1 draft does not attempt to
1302 define district court authority. Rather, it is framed in terms that apply only when independent
1303 doctrine establishes that a pending appeal defeats the district court's authority to act on a motion.
1304 A party can file a motion in the alternative, arguing that the district court has authority and should
1305 grant the motion, and arguing alternatively that the district court should indicate that it would grant
1306 the motion if it concludes that it needs a remand to establish its authority. One complex illustration
1307 is provided by a case in which a qui tam relator appealed from dismissal for want of jurisdiction of
1308 a False Claims Act action. While the appeal was pending the Department of Justice concluded that
1309 it should intervene in the action. It would be useful to be able to win a district-court ruling that
1310 intervention would be granted if the court of appeals were to remand.

1311 Support for the Rule 62.1 alternative was offered with a different example. One party to a
1312 class action might take an appeal. Then settlement becomes possible. It can be important to win a
1313 remand so the trial court can proceed to settlement.

1314 It was noted that neither the Rule 60 version nor the Rule 62.1 version would affect the time
1315 limits for making motions.

1316 A narrower question is presented by a drafting alternative. The rule can call for an indication
1317 that the district court "would" grant the motion on remand, or instead it can call for an indication that
1318 the district court "might" grant the motion. There are competing concerns. The court of appeals may
1319 be reluctant to remand without an assurance that delay of the appeal will lead to accelerated
1320 disposition of the new issues put to the district court. But the district court may be reluctant to invest
1321 heavily in full proceedings and decision when the court of appeals may proceed to resolve the appeal
1322 — and on grounds that may moot the district court's indicative grant of relief.

1323 The question whether the district court should be able to seek remand by stating only that it
1324 "would" grant relief was approached by asking whether "would likely" is a useful compromise. This
1325 proposal was attractive, but "might" was further supported. The court of appeals, after all, is left in
1326 control. It can decide whether "might grant" provides a sufficient reason to remand in light of the
1327 progress of the appeal and the weight of the reasons for investing further district-court effort only
1328 if a remand provides assurance that an appellate decision will not defeat the effort. A district judge
1329 will have to invest more effort to determine that it "would" grant the motion than to determine that
1330 it "might" grant the motion. But perhaps that is a good thing — the court has to think harder. On
1331 the other hand, the district court has the alternative option — which must be written into the rule —
1332 to defer any consideration at all. The ability to consider the motion to the point of determining that
1333 a real investment of effort will be required to reach a final conclusion may be important. A remand
1334 in this circumstance will allow the court to go either way, to grant the motion or to deny it.

1335 It was pointed out that if the rule published for comment is the broader version, Rule 62.1,
1336 the indicative ruling practice will be extended into territory where it is not firmly established. For
1337 this reason, it seems better to publish it with bracketed alternatives — the district court can indicate
1338 that it "[might][would]" grant relief if the case is remanded.

1339 A motion was made to adopt the broader Rule 62.1 version. Discussion began with the
1340 observation that the most common application of this version will involve interlocutory injunction
1341 appeals under § 1292(a)(1). Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish a firm
1342 rule not only that the district court can act on a motion to "suspend, modify, restore, or grant an
1343 injunction," but also that it is the preferred forum. Several courts of appeals, however, defeat these
1344 rules by relying on the theory that an appeal ousts district-court jurisdiction of the order being
1345 appealed. One approach to this problem might be to rewrite these rules to establish that they mean
1346 what they rightly say — it is better that the first consideration be in the court of appeals. This
1347 invitation was not taken up.

1348 It was agreed that the broad Rule 62.1 approach should not attempt to define the situations
1349 in which a pending appeal ousts district-court jurisdiction. Instead it should be drafted in terms that
1350 assume that independent sources of authority establish that the district-court lacks authority.

1351 The motion to adopt the general Rule 62.1 approach was approved, 9 yes and none opposed.

1352 The draft rule in the agenda materials was refined to read:

1353 **Rule 62.1 Indicative Rulings**

1354 **(a) Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to
1355 grant because of an appeal that has been docketed and is pending, the court may:

1356 **(1)** defer consideration of the motion,

1357 **(2)** deny the motion, or

1358 **(3)** indicate that it [might][would] grant the motion if the appellate court should
1359 remand for that purpose.

1360 **(b) Notice to Appellate Court.** The movant must notify the clerk of the appellate court when the
1361 motion is filed and when the district court rules on the motion.

1362 **(c) Indicative Statement.** If the [district] court indicates that it [might][would] grant the
1363 motion, the appellate court may remand the action to the district court.

1364 *Subcommittee Report: Rule 30(b)(6)*

1365 Judge Campbell introduced the report on Rule 30(b)(6) by observing that the Subcommittee
1366 also is addressing at least two questions about Rule 26(a)(2)(B) disclosure of trial expert-witness
1367 reports.

1368 Rule 30(b)(6) came to the agenda with a memorandum from the New York State Bar
1369 Association Committee on Federal Procedure. The Subcommittee sought further information by
1370 sending a letter to bar groups that had commented on the e-discovery amendments. Fourteen letters
1371 were received in response. Professor Marcus also researched the origins of Rule 30(b)(6) and the

1372 case law. Working with these responses, the Subcommittee identified six issues to consider.
1373 Professor Marcus drafted illustrative rule language to focus the discussion.

1374 Some of the issues that arise in practice are case-specific and are not suitable for treatment
1375 in a national rule. For example, there is no way to say that 30(b)(6) depositions should be used at
1376 the beginning or at the end of discovery. Use early in discovery is often important to identify the
1377 sources of information to support further discovery, or to develop information needed for efficient
1378 discovery of electronically stored information. But use later in the discovery period also may be
1379 important.

1380 Another set of issues not likely to yield to rule amendments concern the scope of the
1381 deposition. How broad or particular is the notice of the matters on which examination is requested?
1382 How clear is the deponent's designation of the matters on which a named person will testify? How
1383 closely must examination of the witness adhere to the notice of matters for examination? Responses
1384 indicate that lawyers who represent plaintiffs complain that named witnesses often are unprepared.
1385 Lawyers who represent defendants complain that notices are unclear and that questioning regularly
1386 extends beyond matters identified in the notice. "That's how adversaries are." We cannot hope to
1387 accomplish much by rules changes.

1388 Other questions may be susceptible to rules provisions, but remain difficult. Illustrations are
1389 provided by disputes about the "binding" effect of a witness's answers and by the related questions
1390 whether supplementation after the deposition should be seen as a duty or as an opportunity.

1391 Professor Marcus began his presentation by noting that rule 30(b)(6) is a valuable and
1392 important device. Although there are legitimate concerns about its implementation, the concerns do
1393 not of themselves mean that ameliorative reform is possible. The topics that became the focus of
1394 Subcommittee deliberation seem the best way to introduce the topic.

1395 One suggestion, advanced by David Bernick at the October meeting, was that Rule 30(b)(6)
1396 should to limited to questions that locate the sources of proof. There was no Subcommittee support
1397 for this approach. The original purpose revealed by the 1960s deliberations that led to adoption of
1398 Rule 30(b)(6) in 1970 is to go further. These depositions were analogized to Rule 33 interrogatories,
1399 which clearly go further.

1400 A second set of suggestions arise from disputes about treatment of a witness's deposition
1401 statement as a binding "judicial admission." Many bar groups find this an important problem. Some
1402 groups say there is not enough binding effect, and that the rule should be changed to expand binding
1403 effects. Other groups think there is too much binding effect now. The cases do not establish a clear
1404 picture of present practice. The case most often cited for a strict "judicial admission" approach is
1405 *Rainey v. American Forest & Paper Assn.*, D.D.C.1998, 26 F.Supp.2d 83. But the *Rainey* decision
1406 is tied to failure to prepare the witness, emphasizing that a corporation named as deponent has a duty
1407 to prepare its witness "to be able to give binding answers on its behalf." Other decisions find that
1408 the "sounder view" permits a party to contradict the deposition testimony of its designated witness,
1409 subject to impeachment use of the deposition testimony. This approach at times seems to treat the
1410 designated witness in the same way as a deponent directly named in the notice, and may include the
1411 "sham affidavit" approach that authorizes a court to disregard a self-serving and affidavit that
1412 attempts to defeat summary judgment by contradicting the affiant's deposition testimony. Moore's
1413 Treatise, on the other hand, says that the designated witness's testimony binds the entity. This is a
1414 subject that could be addressed by amendment.

1415 A Subcommittee member observed that the bar group comments provided "excellent input"
1416 on the question of binding effect. The Subcommittee seemed to agree that the better rule permits
1417 an entity named as deponent to present evidence that contradicts the deposition testimony of its
1418 designated witness. Impeachment by use of the deposition is available. The question may arise more

1419 frequently — perhaps much more frequently — than published opinions reflect. And the statement
1420 in the Moore's Treatise will be cited every day by lawyers seeking to take advantage of a purported
1421 admission.

1422 Another comment addressed the "sham affidavit" rule, observing that this "is not a Rule
1423 30(b)(6) problem." It is a form of judicial estoppel. There is no need to amend Rule 30(b)(6) to
1424 address this doctrine.

1425 A Committee member thought it appropriate to leave these questions to the courts. But it
1426 seemed surprising that the letters did not speak to "the problem I encounter most." Rule 30(b)(6)
1427 depositions are used to penetrate work-product protection and privilege. To educate a witness for
1428 the deposition you have to educate the witness in counsel's work product. There are difficult
1429 questions about the extent of the duty to teach the witness about things counsel has found in
1430 preparing for trial.

1431 Discussion of work-product problems began with a reminder that work-product does not
1432 protect fact information uncovered by counsel in preparing for trial. The information is subject to
1433 discovery by deposing individual witnesses, by interrogatory, by production of documents, and by
1434 requests to admit. It is equally subject to discovery through Rule 30(b)(6). The question instead
1435 goes to matters of theory, contention, and strategy.

1436 The bar groups were asked to comment on work-product issues, and provided some
1437 comments. The American College of Trial Lawyers asked whether Evidence Rule 612 applies at all
1438 — are documents used to prepare a witness used to refresh memory, or instead to educate? The New
1439 York State Bar Association memorandum that began this project focused on work-product questions
1440 and attempts to commit the entity to defined contentions through the designated witness. These
1441 questions are difficult. The memorandum by Gregory Joseph in the Evidence Rule 502 agenda
1442 materials remarks that a lawyer should assume that the book of materials used to prepare the
1443 designated witness will be subject to discovery. This question relates to one of the questions
1444 presented by Rule 26(a)(2)(B): is a party obliged to disclose the briefing book used in helping a trial-
1445 expert witness to develop expert opinions?

1446 Professor Marcus returned to the "judicial admissions" problem by pointing to a draft in the
1447 agenda materials. This draft would add two new sentences to Rule 30(b)(6): "The responding
1448 organization must adequately prepare the person or persons designated to testify so that they can
1449 testify as to the information known or reasonably available to the organization. If such preparation
1450 is adequately done, the court may not treat answers given during the deposition as judicial
1451 admissions." This draft "mediates between those who want a clearer duty to prepare and those who
1452 want to address admission effect in the Rule." The rule text could be supplemented by Committee
1453 Note discussion of the nature of the duty to prepare the witness.

1454 The question of binding effect also can be approached through Rule 26(e) by addressing the
1455 duty to supplement testimony provided under Rule 30(b)(6). Rule 26(e) could establish a duty to
1456 supplement or correct testimony by a Rule 30(b)(6) designated witness, and perhaps establish a right
1457 to "retake" the deposition free of the Rule 30(a)(2)(B) need for permission to examine the same
1458 witness twice. The duty to supplement would tie directly to Rule 37(c)(1), which prohibits use of
1459 testimony that a party failed to provide under the duty to supplement. The American Bar Association
1460 Litigation Section was circumspect in addressing this possibility. One concern is that an explicit
1461 duty to supplement might come to be used as an opportunity to delay responses — in effect the
1462 answers at deposition would be "I don't know; we'll get back to you later on that."

1463 The question of scope could be addressed by adding a sentence to Rule 30(b)(6):
1464 "Questioning during the deposition must be limited to the matters for which the person was
1465 designated to testify." The bar groups provided varying reports. Some said that questioning beyond

1466 the designation occurs frequently; others said that judges never allow it; some said that such
1467 questioning occurs, often with the acquiescence of all parties, because it is more sensible than
1468 requiring that the same witness be named in a second notice and deposed as an individual. Still
1469 others raised the question whether questioning that extends beyond the designation automatically
1470 converts the deposition into a second deposition for purposes of the presumptive limit to ten
1471 depositions.

1472 Another suggestion, responding to concern about contention questions, is that Rule 30(b)(6)
1473 should be amended to state that the persons designated by the entity named as deponent "must testify
1474 to factual information known or reasonable available to the organization." Administration of this
1475 provision might prove difficult. What should be done, for example, with a question that asks for "all
1476 facts that support paragraph 4 of the complaint"?

1477 Perhaps predictably, a number of comments addressed application of the rules that govern
1478 the number and duration of depositions. Some of the answers are clearly established now, and seem
1479 right. The Committee Note to Rule 30(a) states that a 30(b)(6) deposition counts as one deposition
1480 "even though more than one person may be designated to testify." The Committee Note to Rule
1481 30(d) says that the seven-hour limit applies separately to each person designated. But there is no
1482 clear answer to the question whether a second 30(b)(6) deposition of the same organization is subject
1483 to the Rule 30(a)(2)(B) requirement for permission or stipulation if "the person to be examined
1484 already has been deposed in the case."

1485 Complaints about the difficulty of preparing one or more witnesses to testify about
1486 information "known or reasonably available to the organization" might be addressed by amendment.
1487 In preparing Rule 30(b)(6), the Committee rejected a version that called for testimony on information
1488 "readily obtainable" by the organization. It would be possible to soften the rule now by referring to
1489 information "readily" available. But — particularly by relieving the organization of the duty to
1490 prepare the witness on all information "known" to the organization — this might reduce the value
1491 of 30(b)(6) too far.

1492 Discussion began with an observation that one judge encounters contention questions on Rule
1493 30(b)(6) depositions "all the time." People would rather bind the corporation by asking deposition
1494 questions of a witness than by using interrogatories. Interrogatory answers will be carefully framed
1495 by a lawyer. A witness, no matter how well prepared, cannot be expected to be as careful or as
1496 precise. Questioners "use it to beat people over the head."

1497 There may be some relation between contention questions and complaints that deposition
1498 notices are too broad, or that notices are too specific but on too many topics, or that questions are
1499 asked on topics unrelated to the notices. But it is difficult to improve on the drafting of the present
1500 rule in these respects. Self-control by attorneys, and when necessary control by the court, are the
1501 most effective devices.

1502 It was suggested that part of the response to concern about admissions and contention
1503 questions may lie in clearly recognizing a right to supplement deposition testimony. Any other
1504 witness has a right to supplement deposition testimony at trial.

1505 A different slant was taken on contention discovery by suggesting that if a contention
1506 question is asked during early discovery the proper answer should be that the information is not yet
1507 reasonably available. If need be, a protective order could be sought on this ground.

1508 The evolution in Rule 30(b)(6) practice was noted. For many years these depositions were
1509 used to identify sources of information to be sought by other discovery methods. That use responded
1510 to the purpose that launched the rule. But today these depositions are used for gamesmanship. "Tell
1511 me everything you've learned about the case." Rule 33 interrogatories are not extensively used in

1512 "big" cases. A lawyer will draft an answer that cannot be usefully read to a jury. The deposition "is
1513 just a shortcut to get inside what other lawyers have done." It is used to trip up the witness.

1514 A defense of 30(b)(6) depositions was offered. They can be a useful short cut, compared to
1515 the "long cut" by interrogatories and individual depositions. Not only are more costly modes of
1516 discovery avoided. A Rule 30(b)(6) deposition may be the only way to get straight answers.

1517 The Subcommittee agreed that it should work further on the use of Rule 30(b)(6) deposition
1518 testimony as a judicial admission. Judge Campbell asked whether it also should work further on
1519 supplementing the testimony, noting that under present Rule 26(e) the only occasion for
1520 supplementing deposition testimony arises from deposition of a trial-expert witness. If
1521 supplementation is required, Rule 30(b)(6) depositions would be treated differently from other
1522 depositions. That may not be a good thing. And it would not be good to allow supplementation only
1523 on showing good cause. The deposition remains a process of questioning a human witness. A
1524 person answering questions may not answer perfectly the first time around. A right to supplement
1525 of course affects potential use of an original deposition answer as a judicial admission. In any event,
1526 if rule language is adopted to address the admission question, supplementation will be implicated
1527 whether or not an explicit rule provision addresses supplementation.

1528 Judge Campbell summed up the discussion. The Subcommittee will not address questions
1529 such as the number of depositions or second depositions of the same organization. It is widely
1530 recognized that the organization has a duty to prepare the witness; there is no need to elaborate in
1531 the rule. One proposal from a bar group recommended adoption of the California approach, which
1532 requires designation of the "most knowledgeable" person. To the extent that approach is different
1533 from Rule 30(b)(6), there is little apparent reason to change direction now. Rule 30(b)(6) is
1534 functioning well enough. A Committee member observed that in practice the California rule is not
1535 much different from Rule 30(b)(6) anyway.

1536 The Subcommittee will consider the admission issue, noting that the cases seem to be moving
1537 toward the conclusion that the deposition testimony is not binding. It also will consider the "work-
1538 product" issues.

1539 *Rule 26(a)(2)(B)*

1540 Jeffrey Greenbaum reported on the American Bar Association Litigation Section report on
1541 discovery of work-product and privileged information revealed to a trial-expert witness. The report
1542 is not yet official ABA policy; it will be submitted to the House of Delegates with a recommendation
1543 for adoption.

1544 The cases divide on protecting by privilege communications between an expert trial witness
1545 and counsel.

1546 Discovery of draft expert reports also is treated in different ways. Some judges order at the
1547 beginning of a case that drafts be preserved. Some experts flatly refuse to keep drafts, or even to
1548 make a draft. A cautious attorney simply talks with the expert, or views a draft report only on a
1549 computer screen. Experts often scrub drafts from their hard drives. The difficulties created by these
1550 practices are reflected by part of the 1993 Committee Note that recognizes that an expert witness
1551 may need an attorney's help in preparing a disclosure report, offering an automobile mechanic as an
1552 example.

1553 The ABA recommends adoption of a national rule to establish uniform practice. The rule
1554 should bar discovery of draft reports. And it should protect work-product involved in exchanges
1555 between the attorney and the expert trial witness. Disclosure and discovery should still be available
1556 as to the expert's analysis and the data on which it is based. The expert can be cross-examined. This

1557 system will protect against the disadvantages that arise when a well financed party is able to hire two
1558 sets of experts, one set acting as trial consultants protected by work-product, while another party is
1559 able only to hire trial experts who will be subject to full discovery. New Jersey has had such a rule
1560 for a few years, and it works well.

1561 It was noted that Massachusetts has a rule similar to the New Jersey rule, and reported that
1562 it works well.

1563 Professor Marcus noted that the 1993 Committee Note operated on the premise that "the
1564 collaborative process of preparing expert testimony" should be in the open. Disclosure and discovery
1565 are advanced as important counterbalances to the adversary character of expert testimony.

1566 The question whether to permit discovery leads to the further question whether a different
1567 rule should apply at trial. Is it desirable to bar disclosure or discovery of something that can be
1568 sought at trial?

1569 The Subcommittee will study the questions raised by the ABA report. It also will continue
1570 to study the distinctive treatment that Rule 26(a)(2)(B) extends to expert trial witnesses who are
1571 employees of a party and whose duties as employees do not regularly involve giving expert
1572 testimony.

1573 *Ongoing Project: Rule 56*

1574 Judge Rosenthal reported that work on the Rule 56 project has proceeded. The primary work
1575 is reflected in a thorough report by James Ishida that distills a great amount of work in collecting and
1576 organizing local rules on summary judgment. The local rules take a wide range of approaches. There
1577 may be much to be learned from them in revising the national rule.

1578 Rule 56 practice has developed away from the practices that might be inferred from the rule
1579 text. The Committee has been reluctant to reconsider the standard for deciding whether there is a
1580 genuine issue of material fact. But there is continuing interest in revising the procedures for
1581 considering a Rule 56 motion, for determining whether there is a genuine issue.

1582 The Committee agreed that a proposal focusing on Rule 56 procedures should be prepared
1583 for consideration at the fall meeting.

1584 *Ongoing Project: Rule 8 — Notice Pleading*

1585 Judge Rosenthal recalled the decision that summary judgment should be considered in
1586 tandem with notice pleading. The common core involves identifying the optimal use of pleading,
1587 discovery, and summary judgment to identify and dispose of cases that do not merit trial. An
1588 adequate opportunity for discovery must be provided, but there may be room to improve present
1589 practice.

1590 The primary work since the last meeting is reflected in a report by Jeffrey Barr on
1591 "heightened pleading" decisions. Supreme Court decisions rule that heightened pleading can be
1592 required only when demanded by rule or statute. Otherwise notice pleading governs. But the
1593 opinions recognize that there may be unmet needs for heightened pleading that could be addressed
1594 by amending the pleading rules. The Barr memorandum surveys many recent decisions, including
1595 not only those that reject heightened pleading but also some that gamely continue to require it. It is
1596 excellent work.

1597 A survey of express statements in opinions may not tell the whole story. Even as courts
1598 continue to say that they do not require heightened pleading, some opinions seem to demand levels
1599 of detail far different from the pictures painted by the Rule 8 Forms. Practice seems to reflect the
1600 views of at least some judges that some forms of litigation require more careful initial screening than

1601 bare notice pleading supports.

1602 The initial work has addressed several options. "Fact" pleading might be restored,
1603 abandoning the 1938 experiment with what is commonly called "notice" pleading. Or Rule 8 might
1604 be amended to give teeth to the requirement that the plain and simple statement show that the pleader
1605 is entitled to relief. Or specific rules might be adopted for specific claims, in the mode of Rule 9(b).
1606 Or, failing any general approach, an attempt might be made to reinvigorate Rule 12(e), moving it
1607 back toward the former bill of particulars.

1608 Initial discussion suggested that there is not much enthusiasm for reverting to fact pleading.
1609 Nor is there much enthusiasm for attempting a general redefinition of notice pleading. It does not
1610 seem likely that proposals to abandon notice pleading, or to redefine it, would survive the full course
1611 of Enabling Act scrutiny. Some observers believe that courts will de facto follow variable standards,
1612 generally requiring more exacting pleading standards in some types of cases. And at least some of
1613 those who hold this view conclude that the practice is a good thing. But many of them also believe
1614 that it would be pointless to attempt either to enshrine this approach in rule text or to extirpate it.

1615 The alternative of adopting specific pleading rules for specific types of claims was considered
1616 next. It is possible to expand Rule 9(b) to require particularized pleading of claims in addition to
1617 claims of fraud or mistake. Or Rule 9 could be expanded by adding additional subdivisions. Or a
1618 provision might be added to recognize authority to adopt local pleading requirements in the manner
1619 of the standing orders or local rules that require "case statements" in actions under the Racketeer
1620 Influenced and Corrupt Organizations Act.

1621 Two difficulties were identified with the task of developing claim-specific pleading rules.
1622 One problem arises from the need for detailed knowledge about the underlying substantive law and
1623 the practicalities of litigating claims arising under that law. Another problem arises from the
1624 perception that the seemingly procedural pleading rules are surreptitiously motivated by distaste for
1625 the substantive rights or defenses subjected to higher standards.

1626 Greater enthusiasm was expressed for exploring an expansion of Rule 12(e). The draft in the
1627 agenda materials would authorize an order for a more definite statement when more particular
1628 pleading will support informed decision of a motion under Rule 12(b), (c), (d), or (f). This case-
1629 specific approach might improve the position not only of defendants but also of plaintiffs who now
1630 must contend with unstated practices that in operation require heightened pleading without useful
1631 guidance.

1632 *Federal Judicial Center Report*

1633 Thomas Willging reported on the preliminary phases of the Federal Judicial Center study of
1634 the Class Action Fairness Act. He began by noting that class actions have been discussed at every
1635 meeting of the Advisory Committee that he has attended since 1994. The interim report was
1636 prepared by Willging with Emery lee and others.

1637 The first phase will study filing practices. The interim report covers three districts; it is
1638 hoped that all districts can be covered by next September. They also hope to extend the study
1639 beyond the current time limit, June 30, 2005.

1640 One surprise has been the level of activity. In the 1994 study of four districts, they found 407
1641 cases terminated over a period of 2 years. For only three of those districts, this study shows 1,871
1642 filings over a period of four years. That looks like a big increase. The figure will be broken down
1643 into smaller components as the study proceeds.

1644 Changes in the rate of filings over the four-year period show that in two of the three districts,
1645 Northern California and Northern Illinois, filings increased in the short period between the effective
1646 date of CAFA, February 18, 2005, and June 30. They had expected there would be a lag before

1647 filings increased, in light of rumors that lawyers were accelerating the time of filing state-court
1648 actions before February 18 to defeat removal.

1649 Separate attention is being paid to state-based contract and tort actions to see whether these
1650 actions will be shifted to federal courts after CAFA. Current filings are very low. This establishes
1651 a clear base for comparison.

1652 Removals will be examined closely. The experience has been that there is a low level of
1653 diversity filings and a low level of removals. This pre-CAFA experience may make it easier to
1654 examine the causal effects of CAFA.

1655 *Next Meeting*

1656 The next meeting is scheduled for September 7 and 8 in Nashville, Tennessee, at the
1657 Vanderbilt Law School. The dates will be changed only if it is possible to reduce further the number
1658 of scheduling conflicts.

1659 *Vote After Meeting*

1660 The questions left open for final decisions by electronic voting after the meeting were
1661 submitted to the Committee on May 30 and resolved by balloting that concluded on June 1.

1662 The Committee approved revised text for Rule 86(b), style changes to integrate into the Style
1663 Rules the electronic-discovery amendments scheduled to take effect next December 1, expanded
1664 Committee Note language for Style Rule 1 that provides a general description of the purposes and
1665 methods of the Style Project, and restoration to the Committee Note for Style Rule 65(d) of a
1666 paragraph explaining resolution of the ambiguity described above. The final texts of these new
1667 materials are appended.

Respectfully submitted,

Edward H. Cooper
Reporter

ATTACHMENTS

May 30, 2006

To: **Civil Rules Committee**

From: **Judge Lee Rosenthal**
Professor Edward Cooper

Re: **Final Items, Style Project**

Dear Colleagues:

Many thanks for the perseverance and patience that enabled us to complete last week's ambitious agenda. As you know, a few items on the Style Project remained to be completed after the meeting. Those final pieces of the project are attached to this memo. This memo will also serve as a form of ballot for you to express your reactions.

1. Rule 1 Note language.

At the meeting, we discussed how best to provide a summary of the drafting guidelines and principles used throughout the Style Project. The most effective and convenient means is in the Note to Rule 1. The first item attached is proposed Note language that describes the general drafting guidelines and principles that apply to all the Style rules.

_____ I approve the proposed Note 1 language

_____ I approve the proposed language, but would suggest minor revisions, as follows:

_____

_____

_____ I do not approve the proposed language

2. Proposed Changes to Rule 86(b)

At the meeting, your comments and suggestions for clarifying and simplifying the rule and note language to new Rule 86(b), to address the "supersession" concerns that emerged during the comment period, were very helpful. The second item in these materials is the revised language to Rule 86(b) and the accompanying Note.

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_____ I approve the proposed Rule 86(b) language (rule and note)

_____ I approve the proposed language, but would suggest minor revisions, as follows:

_____

_____

_____ I do not approve the proposed language

3. Note Language for Rule 65(d)

During the meeting, we agreed to delete Note language explaining the change to restyled Rule 65(d), which in part involved restoring a comma omitted from the existing Rule. A look at the minutes from the November 2005 hearing, in which we were urged to include an explanation of the change in the Note, convinced us that the omission was unwise. The ambiguity in the present rule is so plain that it is better to explain our confidence in resolving ambiguity into clarity. The third attachment to this memo is a slightly revised version of the Note language explaining that change.

_____ I approve the proposed Note language for Rule 65(d)

_____ I approve the proposed language, but would suggest minor revisions, as follows:

_____

_____

_____ I do not approve the proposed language

4. Electronic Discovery Rules

The style changes to the electronic discovery rules – 16, 26, 33, 34, 37, and 45 – provided suggestions from the Committee that Professors Marcus and Kimble have worked to implement. The fourth and final attachment to these materials is the revised style version of these rules. This attachment uses the text of the agenda materials (behind Tab 3B). This Committee agreed to many of the changes proposed by the Standing Committee Style Subcommittee; those changes have now been implemented. The attachment also shows changes made to satisfy additional concerns of the Standing Committee Style Subcommittee discussed at the meeting, largely about the repeated use of "form or forms" and the repeated use of ""copying, testing, or sampling" in Rule 45.

The attachment shows all changes to the material in the text of the agenda materials as "redlined" on the screen and as shaded when printed on a standard printer. If words or punctuation

that were included as text in the agenda materials have been deleted, they are struck over and also redlined. If new words have been added, they are redlined. The other markings (e.g., underlining and double underlining, strikeover, etc.) should be as they were in the agenda materials.

_____ I approve the proposed language for the electronic discovery rules

_____ I approve the proposed language, but would suggest minor revisions, as follows:

_____

_____

_____ I do not approve the proposed language

5. TIME FOR RESPONDING

As you know, scheduling led to a very short time between our meeting and the Standing Committee's meeting, and considerable work is involved in preparing the final version of the Style materials for the Standing Committee. Please get your reactions and suggestions back to James Ishida as quickly as possible, and in no event later than **June 1**. While your comments and suggestions are always welcome, the press of time means that it will be difficult to circulate further changes to the entire Committee before "press time."

Again, thanks for all your work and time. You make this process a real pleasure.

ATTACHMENT 1

RULE 1 NOTE LANGUAGE

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is established. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "civil actions and proceedings." This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

The Style Project

The Civil Rules are the third set of the rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure apply the same general drafting guidelines and principles used in restyling the Appellate and Criminal Rules.

1. General Guidelines

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995).

2. Formatting Changes

Many of the changes in the restyled Civil Rules result from using format to achieve clearer presentation. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are avoided. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rule 14(a) illustrates the benefits of formatting

changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved without affecting meaning by the changes from "infant" in many rules to "minor" in all rules; from "upon motion or on its own initiative" in Rule 4(m) and variations in many other rules to "on motion or on its own"; and from "deemed" to "considered" in Rules 5(c), 12(e), and elsewhere. Some variations of expression have been carried forward when the context made that appropriate. As an example, "stipulate," "agree," and "consent" appear throughout the rules, and "written" qualifies these words in some places but not others. The number of variations has been reduced, but at times the former words were carried forward. None of the changes, when made, alters the rule's meaning.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. "The court in its discretion may" becomes "the court may"; "unless the order expressly directs otherwise" becomes "unless the court orders otherwise." The absence of intensifiers in the restyled rules does not change their substantive meaning. For example, the absence of the word "reasonable" to describe the written notice of foreign law required in Rule 44.1 does not mean that "unreasonable" notice is permitted.

The restyled rules also remove words and concepts that are outdated or redundant. The reference to "at law or in equity" in Rule 1 has become redundant with the merger of law and equity. Outdated words and concepts include the reference to "demurrers, pleas, and exceptions" in Rule 7(c); the reference to "mesne" process in Rule 77(c); and the reference in Rule 81(f) to a now-

abolished official position.

The restyled rules remove a number of redundant cross-references. For example, Rule 8(b) states that a general denial is subject to the obligations of Rule 11, but all pleadings are subject to Rule 11. Removing such cross-references does not defeat application of the formerly cross-referenced rule.

4. *Rule Numbers*

The restyled rules keep the same rule numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity. The only change that moves one part of a rule to another is the transfer of former Rule 25(d)(2) to Rule 17(d). The restyled rules include a comparison chart to make it easy to identify transfers of provisions between subdivisions and redesignations of some subdivisions.

5. *Other Changes*

The style changes to the rules are intended to make no changes in substantive meaning. A very small number of minor technical amendments that arguably do change meaning were approved separately from the restyled rules, but become effective at the same time. An example is adding "e-mail address" to the information that must be included in pleadings. These minor changes occur in Rules 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78.

ATTACHMENT 2

Rule 86. Effective Dates.

* * * * *

(b) December 1, 2007 Amendments. If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

COMMITTEE NOTE

Rule 86(b) is added to clarify the relationship of amendments taking effect on December 1, 2007, to other laws for the purpose of applying the "supersession" clause in 28 U.S.C. § 2072(b). Section 2072(b) provides that a law in conflict with an Enabling Act Rule "shall be of no further force or effect after such rule[] ha[s] taken effect." The amendments that take effect on December 1, 2007, result from the general restyling of the Civil Rules and from a small number of technical revisions adopted on a parallel track. None of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law. Rule 86(b) makes this intent explicit. Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.

ATTACHMENT 3

PROPOSED NOTE LANGUAGE FOR RULE 65(d)

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

ATTACHMENT 4

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling.

* * * * *

(3) Contents of the Order.

(A) ***Required Contents.*** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) ***Permitted Contents.*** The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

* * * * *

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including

materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment or to indemnify or reimburse for payments made to satisfy the judgment.

* * * * *

(b) Discovery Scope and Limits.

* * * * *

(2) Limitations on Frequency and Extent.

(A) ***When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) ***Specific Limitations on Electronically Stored Information.*** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering

the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) ***When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

* * * * *

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) ***Information Withheld.*** When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) ***Information Produced.*** If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the

claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule

26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of

deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

* * * * *

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

* * * * *

(D) ***Responding to a Request for Production of Electronically Stored Information.*** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form — or if no form was specified in the request — the party must state the form or forms it intends to use.

(E) ***Producing the Documents or Electronically Stored Information.*** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) The producing party must produce the documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, the party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

* * * * * *

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) ***Requirements.*** Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) ***Combining or Separating a Command to Produce or Inspect.*** A command to produce documents, electronically stored information, or tangible things or to permit inspection may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

* * * * *

(D) ***Command to Produce; Included Obligations.*** A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued from Which Court. A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

* * * * *

(2) Service in the United States. Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) Service in a Foreign Country. 28 U.S.C. § 1783 governs issuing and serving a subpoena

directed to a United States national or resident who is in a foreign country.

(4) Proof of Service. Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) ***Appearance Not Required.*** A person commanded to produce designated documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) ***Objections.*** A person commanded to produce designated materials or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting,

copying, testing, or sampling any or all of the designated materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

* * * * *

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) ***Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) ***Form for Producing Electronically Stored Information Not Specified.*** If a

subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) ***Electronically Stored Information Produced in Only One Form.*** The person responding need not produce the same electronically stored information in more than one form.

(D) ***Inaccessible Electronically Stored Information.*** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) ***Information Withheld.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly assert the claim; and